90-1164

No.

FILED
JAN 22 1991
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

WILLIE ALBERT SMITH,

Petitioner,

vs.

LEE ROY BLACK, Commissioner,
Mississippi Department of Corrections, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRUCE D. ANGIOLILLO
Counsel of Record

JOHN J. KENNEY
DAVID E. MASSENGILL
SIMPSON THACHER & BARTLETT
(A partnership which includes professional corporations)
Attorneys for Petitioner Willie Albert Smith
425 Lexington Avenue
New York, New York 10017-3909
(212) 455-2000

January 22, 1991

QUESTIONS PRESENTED FOR REVIEW

1. Where the only eyewitnesses who testified against a prisoner at trial gave material false testimony on the stand and, contrary to their trial testimony, could not identify Petitioner Willie Albert Smith as a participant in the crime, is it appropriate for a court to refuse to consider that prisoner's challenge to his conviction on the sole ground that the prisoner has failed to prove prosecutorial knowledge of the perjury?

2. Should a court refuse to find a due process violation when a prosecutor negligently uses material perjured testimony, in light of the fact that it is clearly established law under Brady v. Maryland and its progeny that the negligent suppression of material

evidence is an adequate ground for a due process claim?

3. Should a federal court apply the non-retroactivity principle enunciated in Teague v. Lane to a rule of law referenced in Clemons v. Mississippi, when the principle from Clemons upon which Petitioner relies was (a) established by state law prior to Clemons; (b) settled law years before Petitioner's conviction; and (c) the cure for an independent error?

4. Does the non-retroactivity principle enunciated in Teague v. Lane apply to a change in state law?

5. Should a federal court apply the non-retroactivity principle of Teague v. Lane where the state legislature has legislated a result directly contrary to Teague?

6. Does the fundamental protection against execution without individualized consideration implicate bedrock procedural elements crucial to the accuracy of a death sentence, and therefore constitute an exception to Teague?

7. Does the State waive its right to rely upon the Teague v. Lane defense when it fails to raise the defense on its own in any of its briefs to any court and only thereafter relies upon the defense when raised by the Court of Appeals sua sponte?

PARTIES TO THE PROCEEDING

The petitioner in this action is Willie Albert Smith. The respondents in this action are Lee Roy Black, Commissioner, Mississippi Department of Corrections, Steven Puckett, Superintendent, Mississippi State Penitentiary, and the State of Mississippi.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS v

TABLE OF AUTHORITIES viii

CITATIONS TO OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS 3

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 18

I. THE PROSECUTOR'S USE OF PERJURED EYEWITNESS TESTIMONY VIOLATED PETITIONER'S RIGHT TO DUE PROCESS OF LAW 18

A. The Opinion Below Conflicts With The Better Reasoned Second Circuit Decision Of Sanders v. Sullivan 19

1. Petitioner's conviction was founded upon material perjured testimony which was credibly recanted . 21

2. The Sanders decision is better reasoned, as it focuses upon fairness to the accused, not upon prosecutorial culpability 26

3. The rationales for requiring evidence of prosecutorial misconduct are unconvincing . . . 29

B. The Prosecutor's Negligent Use Of Material, Perjured Eyewitness Testimony Violated Due Process 31

1. The Fifth Circuit's reliance upon Mooney to justify its refusal to correct the due process violation in this case is inappropriate 31

2. A refusal to afford due process relief when perjured testimony has been negligently used creates an explicit conflict with Brady and its progeny 33

3. The prosecution negligently used perjured eyewitness testimony to obtain both a conviction and a jury-imposed sentence of death . . . 36

II. THE FIFTH CIRCUIT ERRED IN FAILING TO REVIEW THE UNCONSTITUTIONAL USE OF THE "ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL" AGGRAVATING CIRCUMSTANCE 39

A. The Fifth Circuit Is In Direct Conflict With The Mississippi Supreme Court's Ruling In Johnson III 45

1. Johnson III is the law in Mississippi 45

2. A change in state law does not implicate Teague v. Lane concerns 49

B. Mississippi Specifically Permits Habeas Petitioners To Rely On "New Law" 50

C. Clemons Did Not Announce A New Rule 52

1. The right to individualized treatment is settled law 52

2. Under the central principle of Clemons this case should be remanded to the Mississippi Supreme Court 55

D. Clemons Constitutes An Exception To Teague v. Lane 58

E. Respondent Has Waived Any Teague v. Lane Argument . . 62

CONCLUSION 65

TABLE OF AUTHORITIES

Cases

Baker v. Carr, 369 U.S. 186 (1962) . 30

Billiot v. State, 515 So. 2d 1234 (Miss. 1987) 52

Brady v. Maryland, 373 U.S. 83 (1963) 17, 19, 26, ... 27, 33-36

Braxton v. Estelle, 641 F.2d 392 (5th Cir. Unit A 1981) 33

Buitrago v. Scully, 705 F. Supp. 952 (S.D.N.Y. 1989) 20

Burks v. Egeler, 512 F.2d 221 (6th Cir.), cert. denied, 423 U.S. 937 (1975) 21, 33

Burnett v. Illinois, 619 F.2d 668 (7th Cir.), cert. denied, 449 U.S. 880 (1980) 20-21

Clemons v. Mississippi, ___ U.S. ___, 110 S. Ct. 1441 (1990) . . . 41-64

Clemons v. State, 535 So. 2d 1354 (Miss. 1988), vacated and remanded by ___ U.S. ___, 110 S. Ct. 1441 (1990) 46

Collins v. Youngblood, ___ U.S. ___, 110 S. Ct. 2715 (1990) . . 51, 62

Curran v. Delaware, 259 F.2d 707 (3d Cir. 1958), cert. denied, 358 U.S. 948 (1959) 20

Cuyler v. Sullivan, 446 U.S.
335 (1980) 30

Davis v. Maynard, 911 F.2d 415
(10th Cir. 1990) 43, 64

De La Rosa v. Lynaugh,
817 F.2d 259 (5th Cir. 1987) . . . 56

Durley v. Mayo,
351 U.S. 277 (1956) 30

Eddings v. Oklahoma,
455 U.S. 104 (1982) 42, 43, 54

Erie Railroad Co. v. Tompkins,
304 U.S. 64 (1938) 48-49

Furman v. Georgia,
408 U.S. 238 (1972) 60

Giglio v. United States,
405 U.S. 150 (1972) 34

Godfrey v. Georgia,
446 U.S. 420 (1980) 41, 55, 57,
. 58-59

Hanrahan v. Greer,
896 F.2d 241 (7th Cir. 1990) . . . 62

Hawkins v. Lynaugh, 844 F.2d 1132
(5th Cir.), cert. denied,
488 U.S. 900 (1988) 33

Hill v. Black, ___ U.S. ___,
111 S. Ct. 98 (1990) 54

Hill v. McMackin, 893 F.2d 810
(6th Cir. 1989) 63

Hopkinson v. Shillinger,
888 F.2d 1286 (10th Cir. 1989),
cert. denied, ___ U.S. ___,
110 S. Ct. 3256 (1990) 63

Irving v. State, 498 So. 2d 305
(Miss. 1986), cert. denied, 481
U.S. 1042 (1987) 52

Jackson v. Wainwright,
390 F.2d 288 (5th Cir. 1968) . . . 36

Johnson v. Mississippi,
486 U.S. 578 (1988) 46

Johnson v. State, 508 So. 2d
1126 (Miss. 1987) 52

Johnson v. State, 547 So. 2d 59
(Miss. 1989) (en banc) 45-49
. . . . . 50, 51-52, 57, 64

Jones v. Kentucky, 97 F.2d 335
(6th Cir. 1938) 20, 28

Kampshoff v. Smith, 698 F.2d 581
(2d Cir. 1983) 22

Lewis v. Jeffers, ___ U.S. ___,
110 S. Ct. 3092 (1990) 60

Lindley v. Hamilton, 883 F.2d 360
(5th Cir. 1989) 49

Lockett v. Ohio,
438 U.S. 586 (1978) 42, 43, 54

Maynard v. Cartwright,
486 U.S. 356 (1988) 43, 50, 55-56
. . . . . 59, 61, 62-63

Mayo v. Lynaugh, 893 F.2d 683
(5th Cir. 1990) 62

Mooney v. Holohan,
294 U.S. 103 (1935) 27, 31-33
. . . . . 34, 35

Muniz v. Procunier, 760 F.2d 588
(5th Cir.), cert. denied, 474
U.S. 934 (1985) 49, 50

Neal v. State, 525 So. 2d 1279
(Miss. 1987) 52

Newlon v. Armontrout,
885 F.2d 1328 (8th Cir. 1989),
cert. denied, ___ U.S. ___,
110 S. Ct. 3301 (1990) 43, 64

Penry v. Lynaugh, ___ U.S. ___,
109 S. Ct. 2934 (1989) 54

Riley v. State, 93 Nev. 461,
567 P.2d 475 (Nev. 1977) 27-28

Saffle v. Parks, ___ U.S. ___,
110 S. Ct. 1257 (1990) 59

Sanders v. Sullivan, 863 F.2d
218 (2d Cir. 1988) 19-21, 26-29
. . . . . 30, 31

Sanders v. Sullivan, 900 F.2d 601
(2d Cir. 1990) 20

Shuler v. Wainwright, 491 F.2d 1213
(5th Cir. 1974) 36

Selvage v. Collins, 897 F.2d
745 (5th Cir. 1990) 50, 56, 57

Skipper v. Wainwright, 598 F.2d 425 (5th Cir.) (per curiam), cert. denied, 444 U.S. 974 (1979) 33

Smith v. Black, 904 F.2d 950 (5th Cir. 1990) . . . . . passim

Smith v. Black, 912 F.2d 1465 (5th Cir. 1990) 2, 18

Smith v. State, 419 So. 2d 563 (Miss. 1982), cert. denied, 460 U.S. 1047 (1983) 15, 41, 43, 55, 56

Smith v. State, 434 So. 2d 212 (Miss. 1983) 15

Smith v. State, 457 So. 2d 911 (Miss. 1984) 16

Smith v. State, 492 So. 2d 260 (Miss. 1986) 16, 25

Smith v. State, 500 So. 2d 973 (Miss. 1986) 17

Smith v. Thigpen, 689 F. Supp. 644 (S.D. Miss. 1988), aff'd, 904 F.2d 950 (1990) 2, 17, 25

Stringer v. Black, ___ U.S. ___, 110 S. Ct. 1800 (1990) 54

Stringer v. Jackson, 862 F.2d 1108 (5th Cir. 1988), vacated and remanded, ___ U.S. ___, 110 S. Ct. 1800 (1990) 45, 46, 49, 54, 55, 63

Sumner v. Mata, 449 U.S. 539 (1981) 25

Teague v. Lane,
489 U.S. 288 (1989) 42-64

United States v. Agurs,
427 U.S. 97 (1976) . . . 26-27, 34-35

United States v. Bagley,
473 U.S. 667 (1985) 34, 36

United States v. Bortnovsky,
879 F.2d 30 (2d Cir. 1989) 20

United States v. Langford, 802 F.2d
1176 (9th Cir. 1986), cert. denied,
483 U.S. 1008 (1987) 22

USLIFE Corp. v. United States
Life Ins. Co., 560 F. Supp.
1302 (N.D. Tex. 1983) 64

Walton v. Arizona, ___ U.S. ___,
110 S. Ct. 3047 (1990) 61

Watkins v. Sowders, 449 U.S.
341 (1981) 22

Zant v. Moore,
489 U.S. 836 (1989) 55

Zant v. Stephens,
456 U.S. 410 (1982) 50, 56

Constitutional Provisions

Eighth Amendment 3, 59-60

Fourteenth Amendment 3

Statutes

28 U.S.C. § 1254(1) 3

28 U.S.C. § 2254 17

Miss. Code Ann. § 99-39-23(6) (Supp. 1988) 3, 51

Miss. Code Ann. § 99-39-27(9) (Supp. 1988) 3, 51

Other Authorities

Carlson, False or Suppressed Evidence: Why a Need for the Prosecutorial Tie?, 1969 Duke L.J. 1171 28

Comment, Rethinking the Standard for New Trial Motions Based Upon Recantations as Newly Discovered Evidence, 134 U. Pa. L. Rev. 1433 (1986) 28

Murray, Convictions Obtained by Perjured Testimony: A Comparative Review, 27 Ohio State L. J. 102 (1966) 28, 30

Note, I Cannot Tell a Lie: The Standard for New Trial in False Testimony Cases, 83 Mich. L. Rev. 1925 (1985) . 28, 29

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

WILLIE ALBERT SMITH,

Petitioner,

v.

LEE ROY BLACK, Commissioner, Mississippi Dept. of Corrections, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Willie Albert Smith ("Petitioner"), requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in Smith v. Black, 904 F.2d 950 (5th Cir. 1990). Petitioner is currently under sentence of death in the State of Mississippi.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit affirming the judgment of the District Court for the

Southern District of Mississippi, dated June 26, 1990, is reported at 904 F.2d 950 (5th Cir. 1990), and is set forth as Appendix A. The opinion of the Court of Appeals for the Fifth Circuit denying Petitioner's suggestion for rehearing en banc and petition for rehearing, dated August 24, 1990, is reported at 912 F.2d 1465 (5th Cir. 1990), and is set forth as Appendix B.

The order of the District Court of the Southern District of Mississippi, dated June 13, 1988, is reported at 689 F. Supp. 644 (S.D. Miss. 1988), and is set forth as Appendix C.

JURISDICTION

The orders of the United States Court of Appeals for the Fifth Circuit were entered on June 26, 1990 and August 24, 1990. On November 12, 1990, Petitioner sought, and this Court granted, an

extension of time to file this petition for writ of certiorari. This petition is filed within the extension granted by this Court. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the Eighth and Fourteenth Amendments to the United States Constitution, which provide, in pertinent part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.
>
> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves §§ 99-39-27(9) and 99-39-23(6) of the Mississippi Code, which are set forth as Appendix H.

STATEMENT OF THE CASE

Events of March 15, 1981

At approximately 5:00 a.m. on the morning of Sunday, March 15, 1981, about an hour before dawn, Kenneth Thomas and James Wells were driving by a Tote-Sum convenience store in Jackson, Mississippi (E43-49, 64-65; F110-14).[1/] They later testified that they saw a black man struggling with a white woman in the parking lot of the store, near a small red car (E45-51, 64-67; F16-18, 102-05, 110-14). The struggling figures were at least 60 feet away from the moving car (F61-66). The man's body was obstructed from view (F41-46). Wells was drunk (F19-26).

Thomas and Wells kept driving (E45-53). After searching for a store to cash

---

1/ All cites (e.g., A1, B1) refer to the separately bound appendix submitted herewith.

a check (E43-49, 64-65), they drove back by the Tote-Sum store, where they saw Sgt. Oatis of the Jackson police in the parking lot (E54-55, 68-71, 88-91). As the police radio report and Oatis' notes confirm (F91-101, 145-50), Thomas told Oatis all that he had seen: a black man struggling with a white woman near a small red car (E64-67; F110-14).

Approximately forty-five minutes later, at 5:45 a.m., a Ford Pinto automobile approached the store, turned around and began to drive away (E92-93). Sgt. Oatis stopped the car and saw a tennis shoe inside matching one he had seen in the parking lot. He arrested the driver, Petitioner (E92-102).

Petitioner told Sgt. Oatis the car belonged to Edward Charles McDonald, who lived near Petitioner's home. The police took Petitioner to McDonald's house

(E107-08). McDonald admitted that it was his car. He said that he and others had been at a party with Petitioner until about 4 a.m., when he loaned the car to Petitioner and went home to bed. He took the police to Petitioner's house (E107-08), which was within walking distance. The police entered and found Mrs. Robert's purse, sweater and other personal belongings. They found her body in a wooded area some distance away (F106-09).

The Failed Lineup

The next day, the police took Thomas to a line-up that included Petitioner. Thomas could not identify him. Wells was not even asked to try to identify anyone. Thomas and Wells gave statements to the police stating that they could not identify the man in the Tote-Sum parking lot (F75-77, 84-86).

Pretrial Proceedings

Petitioner was subsequently indicted for robbery-murder, a capital crime. His family retained John Gregg to defend him. The prosecutor for Hinds County was district attorney Ed Peters.

Gregg asked for discovery of all exculpatory materials in the State's files, including the names of any informants who were eyewitnesses. He received a few excerpts from the police report, but he was not given the written statements by Thomas and Wells that they could not identify Petitioner. He was also not given the police records showing that Thomas and Wells told Sgt. Oatis that all they had seen was a black man with a small red car. Nor was he told that Kenneth Thomas was an informant for the Jackson police.

Until the day before trial, Peters had a circumstantial case. While there was some physical evidence tying the victim to Petitioner's apartment, Peters did not have any eyewitness evidence proving that Petitioner abducted Mrs. Roberts, or was involved in her death. At the coram nobis hearing, Peters testified that he was well aware that the absence of eyewitness testimony linking Petitioner to the crime was a problem, because jurors place great weight on eyewitness testimony (F78-80).

When jury selection began on July 27, 1981, Peters still did not have an eyewitness to the crime. The trial jury included four jurors who swore during the voir dire they would not convict Petitioner without eyewitness testimony tying him to the crime (E7-28, 39-42; F78-83).

Thomas and Wells See the Light

While Peters was facing this problem, an investigator for the district attorney, Lt. Bartlett, was solving it for him. Bartlett talked to Thomas and Wells. He questioned Thomas about his inability to identify Petitioner. When Thomas again said he could not identify the man in the parking lot, Bartlett took out five pictures. One of them was of Petitioner (F47-55). Each picture had a name on the back (id.; F120-22). Thomas looked at them and chose the picture of Petitioner by the name on the back (F10-15, 51-55). Bartlett then took Wells aside and told him Thomas had not been able to identify the man. Wells knew the name of the defendant. He chose the picture of Petitioner by the name on the back (F27-40, 125-26).

Bartlett took Thomas and Wells to meet Peters and Assistant District Attorney Vaughan Davis. Bartlett told Peters and Davis that Thomas and Wells would supply the necessary eyewitness testimony. Thomas had an additional incentive to please the prosecutors. He was serving a 22 year probation for armed robbery and was a police informer.

Both Davis and Peters had read the police report. They knew that it was an hour before dawn when Thomas and Wells drove by the Tote-Sum parking lot, that Thomas and Wells had repeatedly said they could not identify the man in the parking lot, and that Thomas could not pick him out of a lineup the day after the crime. However, neither Peters nor Davis questioned Thomas' and Wells' sudden conversion.

The State's Continuing Failure to Disclose Exculpatory Information

Even after Peters had his eyewitness testimony, he did not give Gregg the police reports that showed (i) that Thomas and Wells could not identify anyone the day after the crime, and (ii) that all Thomas or Wells told anyone was that they saw a black man, whom they could not otherwise describe, near a small red car. Nor did he tell Gregg that Thomas was an informant for the Jackson police.

The Trial: The In-Court Identification

Both Thomas and Wells took the stand at the trial, pointed to Petitioner and said that he was the man they saw in the Tote-Sum parking lot (E58-61, 72-73). They did not show any doubt about the identification (E60-61, 82-83).

Gregg's cross-examination was crippled. While he had reports of

interviews of Thomas and Wells by his son and Petitioner's sister, in which Thomas and Wells said they could not identify Petitioner, Gregg did not have Thomas' and Wells' written statements and the police reports contradicting their testimony. He also did not know that Thomas was a police informant.

As he had at an earlier suppression hearing, Petitioner testified and denied guilt and any involvement in the crime.

Summations

Reflecting the importance of eyewitness evidence, both sides discussed the testimony at length during summation. Gregg's summation was devoted almost entirely to an attack on the credibility of Thomas and Wells.

The prosecutor told the jury, among other things, that it should credit the testimony of Thomas and Wells. To rebut

Gregg's claim that Thomas and Wells were influenced by an improper photo show-up, Assistant District Attorney Davis referred to Wells' testimony that he had been left alone in the room with the pictures (E118-20). This despite the fact Lt. Bartlett, who was in the courtroom during Wells' testimony, later testified that Wells was never left alone in the room (E62-63, 78-81; F115-22). The State did not tell the jury that the pictures had names on the back (E118-20).

The Sentencing Hearing

The jury found Petitioner guilty of robbery-murder, based on the perjured testimony. But the prosecutor had to convince the jury to sentence Petitioner to die. The perjured testimony was a significant boost, since the same jury that determined guilt would determine sentence. They had seen and heard Thomas

and Wells point to Petitioner and say, "That's the man."

However, even with the eyewitness testimony, the prosecutor was concerned about removing any residual doubts the jury harbored from the guilt phase that would make them less likely to sentence a man to die. Substantial additional evidence, including evidence of the uncharged crime of rape, was introduced during the sentencing phase of the trial.

The court instructed the jury that it must find any mitigating circumstances outweighed by at least one of three aggravating factors: that the murder was committed during a robbery, for pecuniary gain or that it was "especially heinous, atrocious or cruel". No instruction was given explaining or limiting these terms (E121-27). On July 30, 1981, the jury returned a sentence of death.

Post-Trial Proceedings

Petitioner's conviction was affirmed. Smith v. State, 419 So. 2d 563 (Miss. 1982), cert. denied, 460 U.S. 1047 (1983). A motion in the State Court for leave to file a petition for writ of error coram nobis was denied. Smith v. State, 434 So. 2d 212 (Miss. 1983). Petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Mississippi, Jackson Division, CA-J83-0573(B), in August, 1983.

Counsel for Petitioner thereafter obtained evidence showing that the State's two alleged eyewitnesses perjured themselves at the trial. Petitioner sought and was granted permission to file a petition for writ of error coram nobis in the state court based on evidence of perjury by the only two alleged

eyewitnesses. In re Smith, 457 So. 2d 911 (Miss. 1984). After a hearing in the Circuit Court of Hinds County, the petition was denied. On appeal, the Mississippi Supreme Court unanimously determined that the two eyewitnesses perjured themselves at trial. The court held, however, that the perjured testimony by the State's only eyewitnesses was harmless error. Smith v. State, 492 So. 2d 260, 264-67 (Miss. 1986). In August, 1985, based on information learned after filing the petition, Petitioner moved in the Mississippi Supreme Court for post-conviction relief on two other issues: (1) the prosecutor's racially discriminatory use of peremptory challenges; and (2) the prosecutor's failure to produce the police file at or before trial which would have revealed

exculpatory material, in violation of Brady v. Maryland, 373 U.S. 83 (1963). The motion was denied. Smith v. State, 500 So. 2d 973 (Miss. 1986).

In April, 1987, Petitioner filed an amended petition for writ of habeas corpus in the District Court pursuant to 28 U.S.C. § 2254. On June 13, 1988, without argument or an evidentiary hearing, the District Court denied the petition. Smith v. Thigpen, 689 F. Supp. 644 (S.D. Miss. 1988). Petitioner's Motion to Alter or Amend the Judgment was denied on August 26, 1988. The Fifth Circuit affirmed the District Court's decision. Smith v. Black, 904 F.2d 950 (5th Cir. 1990).

On July 30, 1990, Petitioner filed an application for leave to file a motion to vacate or set aside the death sentence in the Mississippi Supreme Court, and

simultaneously filed a motion to defer proceedings in the Fifth Circuit.

On August 24, 1990, the Fifth Circuit denied Petitioner's motion to defer proceedings, suggestion for rehearing en banc and petition for rehearing. Smith v. Black, 912 F.2d 1465 (5th Cir. 1990).

Petitioner's application for leave to file a motion to vacate or set aside the death sentence is still pending in the Mississippi Supreme Court. The stay of execution remains in effect.

REASONS FOR GRANTING THE WRIT

I. THE PROSECUTOR'S USE OF PERJURED EYEWITNESS TESTIMONY VIOLATED PETITIONER'S RIGHT TO DUE PROCESS OF LAW

The court below held that the State's continued reliance upon perjured testimony after a witness has credibly recanted material testimony does not amount to constitutional error in the absence of affirmative prosecutorial

misconduct at the time the perjured testimony was given. Smith, 904 F.2d at 961-962 (A29-34). This holding conflicts directly with the better reasoned opinion of the Second Circuit in Sanders v. Sullivan, 863 F.2d 218 (2d Cir. 1988) (when material eyewitness testimony is later credibly recanted, due process is violated, even where there is no evidence of prosecutorial misconduct). The decision below is also inconsistent with the requirements set forth in Brady v. Maryland, 373 U.S. 83 (1963), and its progeny.

A. The Opinion Below Conflicts With The Better Reasoned Second Circuit Decision of Sanders v. Sullivan

The court below holds that "for use of perjured testimony to constitute constitutional error, the prosecution must have knowingly used the testimony to obtain a conviction." Smith, 904 F.2d at

961 (A29). The court, therefore, declined to set aside either the conviction or the sentence of death, even though both were based on the same perjured testimony. This holding contradicts Sanders v. Sullivan, 863 F.2d 218, 222 (2d Cir. 1988), in which the Second Circuit held that despite evidence of prosecutorial misconduct, a defendant is denied due process when "a credible recantation of the testimony in question would most likely change the outcome of the trial and a state leaves the conviction in place."[2/] The Sanders case

---

2/ This continues to be the established law of the Second Circuit. See e.g., Sanders v. Sullivan, 900 F.2d 601, 605 (2d Cir. 1990); United States v. Bortnovsky, 879 F.2d 30, 33 n.4 (2d Cir. 1989); Buitrago v. Scully, 705 F. Supp. 952, 957 (S.D.N.Y. 1989).

The decisions among the other circuits vary widely on this issue. Compare Curran v. Delaware, 259 F.2d 707, 713 (3d Cir. 1958), cert. denied, 358 U.S. 948 (1959); Jones v. Kentucky, 97 F.2d 335, 338 (6th Cir. 1938)

(continued...)

deals only with a conviction and not with a jury-imposed sentence. The Fifth Circuit itself explicitly takes note of the circuit conflict. Smith, 904 F.2d at 962 (A35).

1. Petitioner's conviction was founded upon material perjured testimony which was credibly recanted

Petitioner's case falls squarely within the area of conflict between the Second and Fifth Circuits. The perjured eyewitness testimony can only have had a great impact upon the outcome of both the guilt and sentencing phases of Petitioner's trial. Further, the credibility of the recantations of Thomas and Wells has been clearly established. This is therefore an appropriate case in

---

2/(...continued)
with Burnett v. Illinois, 619 F.2d 668, 674 (7th Cir.), cert. denied, 449 U.S. 880 (1980); Burks v. Egeler, 512 F.2d 221, 229 (6th Cir.), cert. denied, 423 U.S. 937 (1975).

which to resolve the circuit conflict outlined above.

Thomas and Wells were the only two eyewitnesses to testify at Petitioner's trial. Their testimony had a striking impact on both Petitioner's conviction and sentence. Four jurors, during the process of jury selection, said that they would not convict the Petitioner in the absence of eyewitness testimony (E7-28, 39-42). Further, the prosecutor who tried the case later testified at a hearing before the trial court that he could not get a death sentence without eyewitness testimony (F78-83).[3/]

3/ Such statements only serve to underscore the generally accepted principle that eyewitness testimony has a dramatic effect on the minds of jurors. See Watkins v. Sowders, 449 U.S. 341, 352 (1981) (Brennan, J. dissenting) (citing E. Loftus, Eyewitness Testimony at 19 (1979)); see also United States v. Langford, 802 F.2d 1176, 1182 (9th Cir. 1986), cert. denied, 483 U.S. 1008 (1987); Kampshoff v. Smith, 698 F.2d 581, 587 (2d Cir. 1983).

This eyewitness testimony is also the only evidence tying Petitioner to the scene of the initial abduction of the victim. Without the perjured testimony of Thomas and Wells, the only description of the perpetrator at the Tote-Sum store is that he was a black male driving a small red car. Petitioner denied at trial that he had any involvement in the crime. Absent the eyewitness testimony, the trial evidence is consistent with this position as well as the participation of one or more other people. For example, the evidence is consistent with Edward Charles McDonald's presence and participation in the abduction -- indeed, McDonald owned the "small red car." Moreover, given the distances and other details of the crime, the participation of more than one person in the abduction and murder is likely.

Under the prosecution's theory of the crime, Smith abducted Mrs. Roberts at approximately 5 a.m., forced her into the Pinto, drove the three miles back to his home in a car that was largely incapable of high speeds, robbed her, raped her repeatedly, strangled her, dragged her body out of the house seventy-five yards into the woods, and returned to the scene of the crime within 45 minutes (E103-04, 105-06, 109-10, 116-17; F95-101). Both the statement of the jurors regarding the necessity of eyewitness testimony and the lack of other evidence connecting Petitioner with the scene of the abduction make clear that the eyewitness testimony purporting to establish that Petitioner abducted Mrs. Roberts from the Tote-Sum store is highly material to his conviction, as well as to his sentence.

It is equally clear that this testimony was credibly recanted by both Thomas and Wells. The Mississippi Supreme Court found that the recantations were sufficient to establish that Thomas and Wells perjured themselves at trial. Smith v. State, 492 So. 2d 260, 264 (Miss. 1986).[4/] Similarly, the Fifth Circuit stated that the testimony of Thomas and Wells "is cast into the severest doubt by their after-trial recantations. . . ." Smith, 904 F.2d at 962 (A33). A circuit conflict is

---

4/ The court held that "the evidence adduced at the [coram nobis] hearing clearly shows one thing -- Thomas and Wells lied when they made the in-court identifications of Smith as the assailant they saw that morning." Id. Judge Barbour, in turn, held that he did not need to determine whether Thomas and Wells lied. Smith, 689 F. Supp. at 657 (C59) ("it is immaterial whether the identifications were in fact perjury"). Moreover, federal courts must presume the correctness of fact findings by state appellate courts, particularly when the federal court is reviewing the same record considered by the state court. Sumner v. Mata, 449 U.S. 539, 547-49 (1981).

therefore directly presented in this case.

2. The Sanders decision is better reasoned, as it focuses upon fairness to the accused, not upon prosecutorial culpability

This Court stated in United States v. Agurs, 427 U.S. 97, 110 (1976), that the correct focus in suppression of evidence cases is upon "the character of the evidence, not the character of the prosecutor." The Court made a similar statement in Brady v. Maryland, 373 U.S. 83, 87 (1963) (focus is upon the materiality of the evidence suppressed).

Further, both Agurs and Brady explicitly hold that the level of culpability of the prosecutor is irrelevant in determining whether there has been a due process violation. See Agurs, 427 U.S. at 110 ("[n]or do we believe the constitutional obligation is measured by the moral culpability or the

willfulness of the prosecutor"); Brady, 373 U.S. at 87 (suppression violates due process "irrespective of the good faith or bad faith of the prosecution"). In fact, Brady construes Mooney v. Holohan, 294 U.S. 103 (1935), the primary case relied upon by the Fifth Circuit, as holding that prosecutorial misconduct is irrelevant to the determination of a due process violation. The Brady Court stated that "[t]he principle of Mooney v. Holohan is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused." 373 U.S. at 87. This statement indicates the Court's previous determination that the use of material perjured testimony constitutes a violation in the absence of prosecutorial misconduct.[5/]

5/ Other courts and commentators agree. See, e.g., Sanders v. Sullivan, 863 F.2d 218, 224 (continued...)

Moreover, whatever its utility, proving prosecutorial misconduct is extraordinarily difficult. Absent a prosecutor's admission that he knowingly used perjured testimony, circumstantial evidence must be used to rebut the prosecutor's claims of his own innocence.[6/] Further, the line between prosecutorial involvement and innocence in the subornation of perjury is not always clear. One commentator argues that incentives to

---

5/(...continued)
(2d Cir. 1988); Jones v. Kentucky, 97 F.2d 335, 338 (6th Cir. 1938); Riley v. State, 93 Nev. 461, 567 P.2d 475, 476 (Nev. 1977); Comment, Rethinking the Standard for New Trial Motions Based Upon Recantations as Newly Discovered Evidence, 134 U. Pa. L. Rev. 1433, 1447-49 (1986); Note, I Cannot Tell a Lie: The Standard for New Trial in False Testimony Cases, 83 Mich. L. Rev. 1925, 1934 (1985)(hereinafter "False Testimony"); Carlson, False or Suppressed Evidence: Why a Need for the Prosecutorial Tie?, 1969 Duke L.J. 1171, 1187; Murray, Convictions Obtained by Perjured Testimony: A Comparative Review, 27 Ohio State L. J. 102, 106 (1966).

6/ See Carlson at 1185; Murray at 107.

testify, while apparently innocent offers by the prosecutor, may encourage the use of perjured testimony.[7/]

3. The rationales for requiring evidence of prosecutorial misconduct are unconvincing

The two primary arguments against applying due process principles to instances of perjury in the absence of prosecutorial misconduct -- that the unknowing use of perjury by the prosecution does not constitute "state action" and that such a rule would undermine the finality of convictions -- are not persuasive.

Whatever the knowledge of the prosecution at the time of trial, the Mississippi Supreme Court has found that perjury occurred at Petitioner's trial. The State is thus on notice that it tried, convicted, continues to

---

7/ See False Testimony at 1942-43.

incarcerate and plans to execute a man whose conviction and sentence are based on perjured eyewitness testimony. As it has been established that state complacency in the face of clear injustice can fulfill the state action requirement, Baker v. Carr, 369 U.S. 186 (1962); Cuyler v. Sullivan, 446 U.S. 335 (1980), there is ample evidence on this record to find that the state action requirement has been met.[8/]

With respect to the finality of judgments, it must be remembered that before a conviction can be overturned, evidence of perjury must be convincingly presented. Moreover, the perjury in question must be material in order for a court to find a constitutional error.

8/ See Durley v. Mayo, 351 U.S. 277, 291 (1956) (Douglas, J., dissenting); Sanders, 863 F.2d at 224. The commentators agree. See, e.g., Murray at 106.

Thus, including all perjury within the ambit of due process protection would have only a slight impact upon the finality of judgments. Sanders, 863 F.2d at 225.

B. The Prosecutor's Negligent Use Of Material, Perjured Eyewitness Testimony Violated Due Process

1. The Fifth Circuit's reliance upon Mooney to justify its refusal to correct the due process violation in this case is inappropriate

In the opinion below, the court cited Mooney for the proposition that in order "for use of perjured testimony to constitute constitutional error, the prosecution must have knowingly used the testimony to obtain a conviction." Smith, 904 F.2d at 961 (A29). However, this interpretation of the holding in Mooney is inaccurate. In Mooney, the Court held that due process was violated when a prosecutor knowingly used perjured

testimony. However, nothing in the Mooney decision limits the holding to the intentional use of perjury. The opinion does not mention the unintentional use of perjured testimony because such a situation was not presented. In fact, the Court stated, in sweeping language, that due process "in safeguarding the liberty of the citizen against deprivation through the action of the State, embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions." Mooney, 294 U.S. at 112.

Further, courts which limit Mooney to cases of prosecutorial knowledge of perjury generally do so without articulating their reasons. This is particularly true of the opinions of the

Fifth Circuit.[9/] Those opinions that have justified the Mooney "rule" have relied upon those rationales discussed and criticized supra Point I.A.3. See, e.g., Burks v. Egeler, 512 F.2d 221, 229 (6th Cir.), cert. denied, 423 U.S. 937 (1975). Thus, the Mooney decision does not provide a strong basis for the Fifth Circuit's rule limiting due process relief to cases of intentional use of perjury.

2. A refusal to afford due process relief when perjured testimony has been negligently used creates an explicit conflict with Brady and its progeny

The line of cases starting with Brady adopt a sliding scale approach to the issue of what level of prosecutorial

---

9/ See, e.g., Hawkins v. Lynaugh, 844 F.2d 1132, 1141 (5th Cir.), cert. denied, 488 U.S. 900 (1988); Braxton v. Estelle, 641 F.2d 392, 395 (5th Cir. Unit A 1981); Skipper v. Wainwright, 598 F.2d 425, 427 (5th Cir.)(per curiam), cert. denied, 444 U.S. 974 (1979).

culpability is necessary to make out a valid due process claim. These cases hold that as the materiality of improper evidence increases, the scienter requirement decreases.[10/] Thus, in the context of suppressed evidence, courts have held that negligent conduct may give rise to a due process violation.

Moreover, the Brady line of cases has implicitly held that Mooney should be interpreted as applying a negligence standard, stating that "[t]he principle of Mooney v. Holohan is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused." Brady, 373 U.S. at 87.

As the Brady opinion indicates, the Brady doctrine itself springs from the

---

10/ See United States v. Bagley, 473 U.S. 667 (1985); United States v. Agurs, 427 U.S. 97 (1976); Giglio v. United States, 405 U.S. 150 (1972).

Mooney decision. In fact, the Court has construed the use of perjured testimony as being encompassed by the Brady doctrine because Mooney, like Brady, addresses the problem of the submission of improper evidence to the jury. The Court has therefore held that the use of perjured testimony comprises one of the "tests" under the Brady line. See United States v. Agurs, 427 U.S. 97, 103-04 (1976).

None of the cases in the Brady line address why the negligent use of perjured testimony should be different from, for example, negligently suppressed evidence. Therefore, cases that limit Mooney's holding to the knowing use of perjured testimony fail to confront what amounts to a gap or inconsistency in the law governing prosecutorial misconduct. Moreover, several courts have recognized

that the Brady line of cases reflects this Court's belief that the withholding of exculpatory or impeachment evidence is just another variation on the use of perjured testimony to obtain a conviction.[11/]

3. The prosecution negligently used perjured eyewitness testimony to obtain both a conviction and a jury-imposed sentence of death

Circumstantial evidence that the prosecutor at Petitioner's trial did actually know that the only two eyewitnesses were lying is overwhelming.[12/]

11/ See Shuler v. Wainwright, 491 F.2d 1213, 1220 n.22 (5th Cir. 1974); Jackson v. Wainwright, 390 F.2d 288, 295 (5th Cir. 1968); see also United States v. Bagley, 473 U.S. 667, 678-80 (1985) (citing Agurs).

12/ (1) The pictures from which Thomas and Wells ultimately identified the Petitioner had the Petitioner's name on the back (F115-22);

(2) Thomas' and Wells' trial testimony was inconsistent with their prior knowledge, recorded on at least four

(continued...)

12/(...continued)

separate occasions: the radio broadcast, their signed statements, the failed lineup, and interviews by Petitioner's relatives (E74-77, 82-83; F56-60, 87-90, 110-14, 133-35, 145-50);

(3) Thomas and Wells repeatedly stated to police and prosecutors that they did not get a good enough look at the perpetrator to identify him (F1-9, 67-71, 130-32, 136-38);

(4) Wells was not given a chance to identify Petitioner at the failed lineup because the district attorney elected not to ask him to pick out the perpetrator after Thomas had failed to identify the Petitioner (E84-85; F136-38);

(5) by the time Thomas and Wells finally identified Petitioner, his name and face had appeared frequently in the local media (E1-6, 29-30, 31-34, 35-38);

(6) at the time of his sudden realization that he could identify Petitioner, Thomas was a police informant on 22 years probation for armed robbery, making him peculiarly susceptible to prosecutorial pressure (E56-57; F72-74, 139-44);

(7) the police report reflects that the police officer whose written report contained Thomas' and Wells' "detailed

(continued...)

Moreover, there was direct evidence that the prosecutor was willing to mislead the jury through false testimony if it would bolster the State's case.[13/] These facts demonstrate that whether or not Petitioner met the Fifth Circuit's test

---

12/(...continued)

observations" of the perpetrator and his vehicle failed to convey those observations when he broadcast a description of the alleged perpetrator and vehicle immediately after speaking with Thomas and Wells (F145-50) (This report was not available to Petitioner's trial counsel. (See Smith, 904 F.2d at 965 (A48))); and

(8) Petitioner was dressed in a blue prison uniform at the time he was identified in court (E72-73).

While all of the material listed above was known to the prosecutors, only points "(5)" and "(8)" were known to the jury.

13/ The prosecutor allowed Wells to testify that he had been left alone to review Petitioner's photograph (E86-87), and even argued this point in his closing argument in support of Wells' credibility (E118-20), although the investigating officer, Bartlett, who was present in the courtroom at the time of Wells' testimony, testified that this was not true (E62-63, 78-81; F115-29).

for establishing prosecutorial knowledge, he certainly established that the prosecutor negligently used perjured testimony, and his due process rights were accordingly and undeniably violated.

There is simply no justification for simultaneously applying a negligence standard to the suppression of evidence and a knowledge standard to the use of perjured testimony. Petitioner submits that this anomaly has been created by historical accident and respectfully suggests that the Court grant certiorari to determine that the negligent use of perjured testimony constitutes a violation of due process of law.

II. THE FIFTH CIRCUIT ERRED IN FAILING TO REVIEW THE UNCONSTITUTIONAL USE OF THE "ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL" AGGRAVATING CIRCUMSTANCE

The jury at Petitioner's trial was charged that it had to find at least one

of the following three aggravating circumstances beyond a reasonable doubt: (1) the murder was committed during a robbery; (2) the murder was committed for pecuniary gain; or (3) the murder was "especially heinous, atrocious or cruel." It was not given any instruction explaining or limiting the term "heinous, atrocious or cruel." (E121-27).

The jury was instructed that it could only sentence Petitioner to death if it found beyond a reasonable doubt that the accumulated aggravating circumstances outweighed the mitigating evidence.

On direct appeal, the Mississippi Supreme Court found no error in the trial court's instruction submitting "heinous, atrocious or cruel" to the jury without any limitation. The Mississippi Supreme Court, therefore, never reached the question of whether the sentence of death

was invalid because this jury instruction violated Godfrey v. Georgia, 446 U.S. 420 (1980). Smith, 419 So. 2d at 568. The Mississippi Supreme Court should therefore be given the opportunity to address this issue, and the Fifth Circuit's failure to give it the opportunity to do so is a violation of the principles of both comity and due process.

In Clemons v. Mississippi, ___ U.S. ___, 110 S. Ct. 1441 (1990), this Court upheld the proposition that even in a "weighing" State like Mississippi, it is constitutionally permissible for an appellate court (as opposed to a jury) to reweigh the aggravating and mitigating circumstances where a jury-imposed death sentence is based in part on an invalid aggravating circumstance. Nevertheless, the Court remanded Clemons to the

Mississippi Supreme Court, because it found that the opinion under review could be read as creating an "automatic" rule that, when an aggravating circumstance relied upon by the jury has been invalidated, the sentence may be affirmed as long as there remains one valid and undisturbed aggravating circumstance. The Court stated that such an automatic affirmance rule in a weighing state would be invalid under Lockett v. Ohio, 438 U.S. 586 (1978), and Eddings v. Oklahoma, 455 U.S. 104 (1982), for it would not give defendants the necessary individualized treatment that would result from actual reweighing.

The Fifth Circuit's opinion in the present matter holds subject to the non-retroactivity principle announced in Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1060 (1989), that portion of this Court's

Clemons opinion which states that an automatic affirmance rule in a weighing state would be invalid under Lockett and Eddings.[14/] The Fifth Circuit therefore found that it was not necessary to address the fact that Petitioner's jury was allowed to consider the unlimited aggravating circumstance, "especially heinous, atrocious or cruel," which this Court held unconstitutionally vague in Maynard v. Cartwright, 486 U.S. 356 (1988).[15/]

14/ This Court denied petitioner's application for a writ of certiorari to review the Mississippi Supreme Court's denial of his direct appeal on March 21, 1983. See Smith v. State, 419 So. 2d 563 (Miss. 1982), cert. denied, 460 U.S. 1047 (1983). Petitioner is therefore entitled to rely on Lockett and Eddings.

15/ Petitioner continues to maintain that Maynard is available to him because the result was "controlled" by Godfrey. See Davis v. Maynard, 911 F.2d 415, 418 (10th Cir. 1990); Newlon v. Armontrout, 885 F.2d 1328, 1333 (8th Cir. 1989), cert. denied, ___ U.S. ___, 110 S. Ct. 3301 (1990). The Fifth Circuit

(continued...)

This holding fails to take account of pre-Clemons state law, and is also in direct conflict with both the letter and spirit of the Clemons opinion. Moreover, it fails to address the fact that virtually all of the evidence presented by the prosecution during the sentencing hearing was admissible solely in support of the unconstitutional aggravating circumstance, "especially heinous, atrocious or cruel." Further, as two recent decisions of this Court make clear, this portion of Clemons constitutes an exception to Teague v. Lane. Finally, the Fifth Circuit erred in raising the Teague issue sua sponte; Respondent can and has intentionally waived the non-retroactivity defense.

15/(...continued)
did not address this issue. See Smith, 904 F.2d at 983 (A139-41).

A. The Fifth Circuit Is In Direct Conflict With The Mississippi Supreme Court's Ruling In Johnson III

1. Johnson III is the law in Mississippi

The Fifth Circuit's holding that this Court made "new law" in Clemons when it noted the invalidity of an "automatic affirmance" rule, is predicated upon prior Fifth Circuit case law. That prior Fifth Circuit case law includes, "most recently," Stringer v. Jackson, 862 F.2d 1108 (5th Cir. 1988), vacated and remanded, ___ U.S. ___, 110 S. Ct. 1800 (1990), "recognizing the Mississippi practice of sustaining verdicts when supported by at least one valid aggravating circumstance." Smith, 904 F.2d at 984 (A146-47). The Fifth Circuit's reliance on Stringer was erroneous.

In a more recent Mississippi Supreme Court case, Johnson v. State, 547 So. 2d 59 (Miss. 1989) (en banc) (Johnson III), the Mississippi Supreme Court made clear that Stringer had misapprehended Mississippi law, or, at least, that Mississippi law has changed since Stringer.[16/] Specifically, the Mississippi Supreme Court in Johnson III held that, in light of this Court's decision in Johnson v. Mississippi, 486 U.S. 578 (1988), invalidating one of several aggravating circumstances:

> There are two courses open to this Court: (1) remand this cause to the circuit court of Pike County for another sentencing hearing, or (2)

16/ Petitioner has repeatedly argued that Stringer, which preceded both Johnson III and Clemons v. State, 535 So. 2d 1354 (Miss. 1988), misapprehended Mississippi law, and that a much more logical reading of the pre-Johnson Mississippi cases is that the presence of a valid aggravating circumstance may, but, depending upon the individual circumstances, need not, save an invalid aggravating circumstance.

> make the decision ourselves as to whether to reimpose the death penalty or reduce Johnson's sentence to life because of the invalidation of this aggravating circumstance which was considered by the original trial jury.

Johnson III, 547 So. 2d at 59-60. Neither of these "two courses" is an automatic affirmance. Moreover, the Mississippi Supreme Court chose the course of remanding for a new sentencing hearing.

Indeed, when the "automatic affirmance" issue was raised during oral argument before this Court in Clemons, counsel for the State of Mississippi -- the very same counsel who represents the Respondents in this case -- argued repeatedly that Mississippi has no "flat, automatic rule":

> **THE COURT:** Does it [Mississippi] have just a flat, automatic rule, so long as one aggravating circumstance remains, it will affirm a death penalty?

MR. WHITE: No, Your Honor.

THE COURT: No?

MR. WHITE: That has been most recently graphically pointed out in the remand in Johnson v. Mississippi. . . .

THE COURT: But does it have an automatic rule that if there are two aggravating circumstances, and one drops out, that it will affirm --

MR. WHITE: No, I don't think there is any automatic rule in effect here. . . .[17/]

Because Johnson III made clear even prior to Clemons that, whatever Mississippi's pre-Stringer redemptive practice may have been, Mississippi's current practice is not to rely upon an "automatic affirmance," under the Erie doctrine the Fifth Circuit should have applied Johnson III regardless of whether Clemons is "new law" as compared with

---

17/ See Transcript of oral argument in Clemons, at 22-23 (emphasis added) (D1-5).

Stringer.[18] Petitioner should not be deprived the benefit of Johnson III simply because a federal court applying earlier ambiguous state court rulings incorrectly interpreted those state court rulings to require a result subsequently held unconstitutional.[19]

2. A change in state law does not implicate Teague v. Lane concerns

Clearly, a decision of the Mississippi Supreme Court which either changes or clarifies existing state law cannot impose a new obligation upon Mississippi, and therefore be subject to the non-retroactivity rule of Teague v.

18/ See Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938); see also Lindley v. Hamilton, 883 F.2d 360, 362-63 (5th Cir. 1989); Muniz v. Procunier, 760 F.2d 588, 589-90 (5th Cir.), cert. denied, 474 U.S. 934 (1985).

19/ This Court in Clemons made no specific finding regarding the status of Mississippi law. Clemons, ___ U.S. at ___, 110 S. Ct. at 1450.

Lane -- Mississippi has imposed any such new obligation upon itself. The due respect for comity which is the rationale underlying Teague therefore requires a result directly opposite from the result obtained by ignoring Johnson III. Put another way, a change in state law does not implicate Teague v. Lane concerns. A due respect for comity requires that the Mississippi Supreme Court be given the opportunity to take appropriate action under current Mississippi law.[20/]

B. Mississippi Specifically Permits Habeas Petitioners To Rely On "New Law"

The Mississippi legislature has legislated a result directly contrary to Teague in its Post-Conviction Collateral Relief Act, under which specifically

---

20/ See Maynard v. Cartwright, 486 U.S. 356, 365 (1988); Zant v. Stephens, 456 U.S. 410 (1982); Selvage v. Collins, 897 F.2d 745 (5th Cir. 1990); Muniz, 760 F.2d at 589-90.

"excepted from [the prohibition on successive petitions] are those cases in which the prisoner can demonstrate either that there has been an intervening decision of the supreme court of either the state of Mississippi or the United States which would have actually adversely affected the outcome of his conviction or sentence . . ." Miss. Code Ann. § 99-39-27(9) (Supp. 1988). See also Miss. Code Ann. § 99-39-23(6) (Supp. 1988). It is manifestly the case that the Mississippi legislature may choose a different rule than that promulgated in Teague. See Collins v. Youngblood, ___ U.S. ___, 110 S. Ct. 2715, 2718 (1990) (Teague is not jurisdictional).

Obviously, the "intervening decision of the supreme court of . . . the United States" in Clemons v. Mississippi, and of the Mississippi Supreme Court in Johnson

III, "actually adversely affect the outcome of [Petitioner's] . . . sentence." Therefore, under Mississippi law Petitioner is entitled to rely on Johnson III and Clemons notwithstanding the non-retroactivity principle announced in Teague v. Lane.[21/]

C. Clemons Did Not Announce A New Rule

1. The right to individualized treatment is settled law

At the outset, it is critical to recognize that the issue accepted for review in Clemons v. Mississippi -- "[d]oes the Eighth Amendment permit an appellate court to save a sentence of death by reweighing aggravating and mitigating factors where the authority

---

21/ See Neal v. State, 525 So. 2d 1279, 1288 (Miss. 1987) (applying intervening decision); Billiot v. State, 515 So. 2d 1234 (Miss. 1987) (same); Johnson v. State, 508 So. 2d 1126, 1128 (Miss. 1987) (same); Irving v. State, 498 So. 2d 305, 315 (Miss. 1986) (same), cert. denied, 481 U.S. 1042 (1987).

for capital sentencing under state law rests exclusively with the jury?" -- necessarily assumes that the State in Clemons did not apply an "automatic affirmance" rule. Indeed, as noted above, when the "automatic affirmance" issue was raised during oral argument before the United States Supreme Court in Clemons, counsel for the State of Mississippi repeatedly argued that Mississippi has no "flat, automatic rule."

This history is important, because it puts in context this Court's reference in Clemons -- a post-Teague case -- to the invalidity of an "automatic affirmance" rule. Without fanfare, the Court simply observed that requiring individualized weighing of all mitigating factors and valid aggravating circumstances was mandated by, and has been settled law

since Lockett v. Ohio, 438 U.S. 586 (1978), and Eddings v. Oklahoma, 455 U.S. 104 (1982).[22/]

Indeed, this Court plainly recognized that the invalidity of an automatic affirmance rule is unaffected by Teague in Stringer v. Black, ___ U.S. ___, 110 S. Ct. 1800 (1990), when it granted the writ of certiorari, vacated the Fifth Circuit's judgment in Stringer v. Jackson, 862 F.2d 1108 (5th Cir. 1988), and remanded Stringer for reconsideration in light of Clemons. See also Hill v. Black, ___ U.S. ___, 111 S. Ct. 98 (1990) (remanding to Fifth Circuit for reconsideration in light of Clemons despite argument by the State that Clemons was held non-retroactive in Smith v. Black). Logically, had there been a

---

22/ See Clemons, ___ U.S. at ___, 110 S. Ct. at 1450; see also Penry v. Lynaugh, ___ U.S. ___, 109 S. Ct. 2934, 2944-47 (1989).

retroactivity problem with Clemons, this Court would have either denied the writ of certiorari, or, at a minimum, remanded with specific instructions to consider the Teague issue.[23/]

2. Under the central principle of Clemons this case should be remanded to the Mississippi Supreme Court

Clemons is only important to the present litigation because the Mississippi Supreme Court in Smith v. State[24/] erred in finding no Godfrey[25/] violation in the use of the "especially heinous, atrocious or cruel" aggravating circumstance,[26/] and accordingly made no

---

23/ See Zant v. Moore, 489 U.S. 836 (1989). Alternatively, the Supreme Court's remand in Stringer must evidence the Court's view that a state may waive the Teague v. Lane defense. See Point II.E.

24/ 419 So. 2d 563 (Miss. 1982).

25/ See Godfrey v. Georgia, 446 U.S. 420 (1980).

26/ See Maynard v. Cartwright, 486 U.S. 356 (1988).

effort to determine the validity of Petitioner's death sentence in light of that violation. See Smith, 419 So. 2d at 568, 574. Therefore, under the central principle in Clemons, the Fifth Circuit should have given the Supreme Court of Mississippi the opportunity to decide, in the first instance, whether Petitioner's death sentence should be carried out despite the invalidity of one of its aggravating circumstances.[27/] Clearly, granting the Mississippi Supreme Court the opportunity to clarify and apply its appellate review procedures after a finding of constitutional error, as this

---

27/ See Clemons, ___ U.S. at ___, 110 S. Ct. at 1451. See also Maynard v. Cartwright, 486 U.S. 356, 365 (1988); Zant v. Stephens, 456 U.S. 410 (1982); Selvage v. Collins, 897 F.2d 745 (5th Cir. 1990); De La Rosa v. Lynaugh, 817 F.2d 259, 268 n.17 (5th Cir. 1987) ("The process by which the state elects, or is required by law, to reform De La Rosa's sentence is a matter of state law").

Court did in Clemons, cannot implicate Teague v. Lane concerns."[28/]

Moreover, even assuming arguendo that there was a change in Mississippi law caused by Clemons v. Mississippi, that change was not of the type contemplated by Teague. The constitutional error in Clemons was that the jury relied upon a vague aggravating circumstance, in violation of the Eighth Amendment as interpreted in Godfrey v. Georgia, 446 U.S. 420 (1980). The alleged automatic affirmance rule was an attempt by the

---

28/ Alternatively, the Fifth Circuit should have certified the following two questions to the Mississippi Supreme Court: (1) did Johnson III and/or Clemons v. Mississippi represent (in the case of Johnson III) and/or require (in the case of Clemons) a change in Mississippi law with respect to the effect of an invalid aggravating circumstance; and (2) if Johnson III and/or Clemons did represent/require a change in Mississippi law, does Mississippi law nevertheless entitle a habeas defendant to rely upon that new law? See Selvage v. Collins, 897 F.2d 745 (5th Cir. 1990); see also supra note 21.

appellate court to cure the Godfrey error. Again, the interest in comity which underlies Teague is not violated by giving a state the opportunity to clarify and apply its appellate review procedures after a finding of constitutional error.

D. Clemons Constitutes An Exception To Teague v. Lane

Petitioner submits that the portion of Clemons on which he relies implicates bedrock procedural elements crucial to the accuracy of the determination of whether Petitioner should have been sentenced to death. Indeed, virtually all of the evidence presented by the prosecution during the sentencing hearing -- including the evidence of rape[29/] --

---

29/ This rape charge was utterly unexpected. The indictment charged robbery-murder. It did not charge rape, although rape-murder is a capital crime. At no time in the voir dire or in the guilt phase did the prosecutor claim that Petitioner raped the victim. Indeed, the prosecutor carefully avoided any

(continued...)

was admissible solely in support of the unconstitutional aggravating circumstance. This portion of Clemons therefore constitutes an exception to Teague v. Lane.[30/]

Indeed, both Maynard and Clemons implicate the most fundamental rule of Eighth Amendment jurisprudence: capital sentencing procedures must "provide a 'meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.'" Godfrey, 446 U.S. 420, 427

29/(...continued)
such claim because, as he candidly admitted, he could not prove rape. (E111-15). All reticence disappeared, however, at the sentencing hearing.

30/ See Teague, 489 U.S. at 307, 311-16; see also Saffle v. Parks, ___ U.S. ___, 110 S. Ct. 1257, 1263 (1990) ("watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding" are applied retroactively despite their novelty).

(1980) (quoting Furman v. Georgia, 408 U.S. 238, 313 (1972)).

In Lewis v. Jeffers, ___ U.S. ___, 110 S. Ct. 3092 (1990), decided after the Fifth Circuit issued its opinion, this Court stated:

> Our capital punishment doctrine is rooted in the principle that "'[t]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be . . . wantonly and . . . freakishly imposed'" . . . . "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."
>
> This principle requires a State to "channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'"

Jeffers, ___ U.S. at ___, 110 S. Ct. at 3099 (citations omitted).

In Walton v. Arizona, ___ U.S. ___, 110 S. Ct. 3047 (1990), also decided after the Fifth Circuit issued its opinion in the present case, Justice Scalia underlined the centrality of the principle of limited discretion in capital sentencing:

> [W]e have routinely read Furman as standing for the proposition that "channeling and limiting . . . the sentencer's discretion in imposing the death penalty" is a "fundamental constitutional requirement," Maynard v. Cartwright, 486 U.S. 356, 382 (1988), and have insisted that States furnish the sentencer with "'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'"

Walton, ___ U.S. at ___, 110 S. Ct. at 3060-61 (Scalia, J., concurring).

This Court could not send a clearer signal that the Godfrey/Maynard/Clemons line of cases, which enforces the central principle of Eighth Amendment jurisprudence, implicates bedrock

procedural elements which must be applied on habeas review of death sentences.

E. Respondent Has Waived Any Teague v. Lane Argument

Respondent's brief to the Fifth Circuit discussed neither the retroactivity of Maynard nor the Teague decision, though it post-dated both. Further, in a supplemental brief filed this spring, after Clemons, Respondent again failed to mention Teague or to suggest that there was any question regarding the retroactivity of Maynard or Clemons. Respondent has therefore waived its right to rely on the Teague doctrine in this case.[31/] The only two circuits to embrace the idea that Teague may be

---

31/ See Collins v. Youngblood, ___ U.S. ___, 110 S. Ct. 2715, 2718 (1990); Hanrahan v. Greer, 896 F.2d 241, 245 (7th Cir. 1990); see also Mayo v. Lynaugh, 893 F.2d 683, 686-87 (5th Cir. 1990) (state waived issue of procedural default by waiting until filing of petition for rehearing to raise the claim).

raised sua sponte do so either without careful reasoning or for reasons that are inapplicable here.[32/] In the year that has passed since these decisions, the Teague doctrine has become sufficiently well established that Respondent has waived the issue by failing to raise it.

Moreover, in both Stringer and Clemons, Respondent argued that Mississippi had been performing a reweighing/harmless error analysis as a matter of Mississippi law. Accordingly, Respondent should be barred from asserting that Maynard and Clemons constitute new rules in Mississippi under the doctrine of judicial estoppel, which bars a party from advocating a position in one forum that is contrary to a

---

32/ See Hill v. McMackin, 893 F.2d 810, 813 (6th Cir. 1989) (no reason given); Hopkinson v. Shillinger, 888 F.2d 1286, 1288 (10th Cir. 1989), cert. denied, ___ U.S. ___, 110 S. Ct. 3256 (1990) (Teague still novel).

position it asserted in a different forum. See, e.g., USLIFE Corp. v. United States Life Ins. Co., 560 F. Supp. 1302, 1305 (N.D. Tex. 1983).

Even before his direct appeal became final, it was unconstitutional under Godfrey for Petitioner's jury to have received a naked "especially heinous, atrocious or cruel" instruction. See Davis v. Maynard, 911 F.2d 415, 418 (10th Cir. 1990); Newlon v. Armontrout, 885 F.2d 1328, 1333 (8th Cir. 1989), cert. denied, ___ U.S. ___, 110 S. Ct. 3301 (1990). Moreover, Mississippi itself has made clear that it has no "automatic affirmance" rule. Petitioner, therefore, suggests that the Court grant certiorari to determine that Johnson III and Clemons are not subject to Teague v. Lane, or at least that the Mississippi Supreme Court should be given the first opportunity to

decide how best to cure the Godfrey error at Petitioner's trial.

CONCLUSION

For all the reasons set forth above, the petition for certiorari should be granted.

Respectfully submitted,

Bruce D. Angiolillo
Counsel of Record

John J. Kenney
David E. Massengill
SIMPSON THACHER & BARTLETT
(a partnership which includes professional corporations)
425 Lexington Avenue
New York, New York 10017-3909
(212) 455-2000

Counsel for Petitioner
Willie Albert Smith

January 22, 1991

90-1164

(2)

JAN 22 1991
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

WILLIE ALBERT SMITH,

Petitioner,

vs.

LEE ROY BLACK, Commissioner,
Mississippi Department of Corrections, et al.,

Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRUCE D. ANGIOLILLO
Counsel of Record

JOHN J. KENNEY
DAVID E. MASSENGILL
SIMPSON THACHER & BARTLETT
(A partnership which includes
professional corporations)
Attorneys for Petitioner
Willie Albert Smith
425 Lexington Avenue
New York, New York 10017-3909
(212) 455-2000

January 22, 1991

TABLE OF CONTENTS

Appendix A — A1-165

Opinion in the United States Court of Appeals For the Fifth Circuit, Smith v. Black, 904 F.2d 950 (5th Cir. 1990)

Appendix B — B1

Opinion re Petition for Rehearing in the United States Court of Appeals for the Fifth Circuit, Smith v. Black, 912 F.2d 1465 (5th Cir. 1990)

Appendix C — C1-88

Memorandum Opinion and Order in the United States District Court for the Southern District of Mississippi, Jackson Division, Smith v. Thigpen, 689 F. Supp. 644 (S.D. Miss 1988)

Appendix D D1-5

Excerpts from the Oral Argument Before the Supreme Court of the United States on November 28, 1989, Clemons v. Mississippi, No. 88-6873

Appendix E E1-127

Excerpts from Record on Appeal in Petitioner's direct appeal of his conviction and sentence, Smith v. State, No. 53564

Appendix F F1-150

Excerpts from the Record on Appeal following the denial of Petition for a Writ of Error Coram Nobis after a hearing in the Circuit Court for Hinds County, Smith v. State, No. 56301

Appendix G G1-3

Affidavit of John E. Gregg (reprinted without exhibit)

Mississippi Code Annotated
§§ 99-39-27(9) and
99-39-23(6)

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-4790

WILLIE ALBERT SMITH,

Petitioner-Appellant,

v.

LEE ROY BLACK, COMMISSIONER,
MISSISSIPPI DEPARTMENT OF CORRECTIONS,
Et Al.,

Respondents-Appellees.

June 26, 1990

Before: POLITZ, KING, and SMITH, Circuit Judges.

KING, Circuit Judge:

Willie Albert Smith appeals the district court's denial of his petition for a writ of habeas corpus from the judgment of conviction and death sentence entered against him on July 30, 1981, in

the Circuit Court of the First Judicial Circuit of Hinds County, Mississippi. Smith was convicted of the murder of a convenience store clerk during the course of a robbery and was sentenced to death. Smith's conviction rests upon the eyewitness testimony of two men who claimed to have seen Smith abducting the clerk and upon circumstantial evidence which the Supreme Court of Mississippi fairly described as "overwhelming." Smith v. State, 492 So. 2d 260, 267 (Miss. 1986).

Among the many claims asserted by Smith in his petition for habeas relief are four that are particularly troubling. The first two relate to the testimony of the eyewitnesses to the abduction. The Mississippi Supreme Court found, by clear and convincing evidence, that the witnesses had perjured themselves at

trial in identifying Smith as the assailant, id. at 261, 264, and Smith claims that his conviction based on their testimony violates the due process clause of the fourteenth amendment. Smith argues further that his ability to impeach the two eyewitnesses at trial was fatally impaired by the prosecution's failure to disclose police reports containing contemporaneous disavowals by the witnesses of their ability to identify the assailant. Third, Smith argues that his sentence rests in part on evidence of rape properly excluded at the guilt phase but admitted at sentencing, and that this evidence, combined with the prosecution's repeated allegation in closing arguments that Smith raped the murder victim, violated his right to due process under the fourteenth amendment. Finally, Smith argues that his sentence

was based in part on an aggravating circumstance, that the murder was "especially heinous, atrocious or cruel," which was unconstitutional at the time his conviction became final. For the reasons set forth below, we affirm the judgment of the district court denying habeas relief based on these claims and on a host of other claims that Smith raises with respect to his conviction and sentence.

I.

The nature of Smith's claims requires a detailed understanding of the crime, the trial, and the post-trial proceedings. Shirley Roberts, the manager of a convenience store in Jackson, Mississippi, was robbed, abducted, and murdered after she attempted to open the store for business shortly after 5 a.m. one Sunday morning.

About 5:30 a.m. Sgt. Oatis of the Jackson Police Department stopped in the convenience store parking lot to use a public phone, and was there approached by two men, Kenneth Thomas and James Wells, who asked him if there had been a robbery, explaining that they had a few minutes earlier seen a black man forcing a white woman into a red Pinto. Oatis noticed that the chain used to secure the store door was lying on the pavement in front of the door, and that nearby lay a $20 bill, a set of car keys, and a silver-colored pair of brass knuckles. On the parking lot next to Oatis' patrol car lay a woman's tennis shoe and a pair of eyeglasses with a silver neck chain. Oatis radioed an alarm at 5:40 a.m., and the police rapidly determined that Roberts had been scheduled to open the

store that morning and that a car remaining in the lot had belonged to her.

At 6:00 a.m., while Oatis remained in the parking lot, the defendant Smith approached the store driving a red Pinto, but reversed direction by making a U-turn after he noticed the police cars parked there. Oatis observed this maneuver and pursued and stopped Smith. Seeing Smith reach under the right-hand seat of the car, and suspecting a weapon, Oatis looked through the car window and noticed a half-protruding woman's shoe that appeared to be the exact mate of the shoe found in the parking lot. Oatis arrested Smith, and while handcuffing him noticed that one of his hands was stained with blood. A jailor subsequently removed a one-hundred dollar bill from the pants Smith was wearing when arrested. At the time of arrest, Smith denied knowing

anything about the woman and refused to discuss the shoe, but agreed to lead the police to Charles MacDonald, the man whose car he had borrowed.

The police were led to MacDonald's room by his mother, where they awoke him from a deep sleep. He explained that Smith had borrowed the car from him at 4:30 that morning after they had returned from a party. The police satisfied themselves that MacDonald was not a likely suspect for the crime, and he led them to Smith's apartment. It was unlocked, and the police entered, fearing for the safety of Roberts. They found her purse and a woman's white sweater on Smith's bed, and on the floor found a lock and key, muddy dress shoes, and a pair of khaki pants stained with mud and blood. In the pants was a one-hundred dollar bill. Mud and leaves were on the

floor by the back door and in the kitchen. About fifteen feet behind the apartment house the police found the beginning of a drag trail, which led after approximately fifty yards to a small drainage ditch from which a human ankle protruded. The victim's body lay face down in the water, covered by leaves and sticks.

A. Guilt Phase

During opening statements, the prosecution made no reference to eyewitness testimony. Smith's trial counsel conceded that the state possessed "awesome" circumstantial evidence, but emphasized several times that he expected no eyewitness testimony, and that if Thomas testified as an eyewitness he would have to "have changed his story," since he had been unable to identify Smith at a lineup held before trial.

Thomas was in fact the first witness called by the state. Thomas testified that he had observed the victim's abduction from approximately thirty feet away while traveling past the convenience store in a car driven by Wells, and that he had been seated on the side of the car closest to the parking lot. He described the sequence of events and the perpetrator's car, a red Pinto, in some detail. Thomas also testified that although he had been initially reluctant to cooperate with the police, he had identified Smith in a lineup conducted by the police the day after the trial. He also testified that he had identified Smith's photograph after viewing five photographs the day before trial, and identified Smith in the courtroom.

On cross-examination, Thomas re-acknowledged that he was on probation

from an armed robbery conviction, and admitted or clarified that he had not identified Smith at the police lineup, that he had told relatives of Smith that he could not identify the man he saw in the parking lot, that he had seen Smith before the day of trial at the suppression hearing, and that the red Pinto had been pointed out to him before trial while it was parked in a police impoundment lot. He explained that he had previously lied in saying that he could not identify Smith because of pressure he had received from his mother and other relatives, and further described the characteristics of the man he saw the morning of the crime.

Wells testified to substantially the same identification of the perpetrator and the car, though he claimed to see the abduction from approximately ten feet

away. On cross-examination, Wells admitted that he could not identify the perpetrator at the time of the incident and had so informed Thomas, that he had told Smith's counsel and several of Smith's relatives that he could not identify the man he saw abduct the victim, that the photographic lineup conducted the day before trial was the first time he had identified Smith to anyone, that he had been told that someone resembling Smith would be in the courtroom, that Smith was easily identifiable in court as the only black sitting with a lawyer and as the only man in a blue jumpsuit, and admitted that he could not identify Smith as the man who had put the victim into the red Pinto. On re-direct, Wells indicated that he had identified Smith at his first

opportunity, namely, the photographic lineup the day before trial.

The state also called as a witness a forensic pathologist, who testified that the victim had been manually strangled to death and that her body bore numerous scratches, abrasions, and bruises, and that her head bore two wounds made by two blows with a blunt instrument. MacDonald testified that Smith had shown him a pair of brass knuckles similar to those found in the parking lot on the evening before the crime was committed and that he had seemed to indicate their presence at the party, and that Smith had not indicated that he had any money that night. Two witnesses testified that the victim had at least one one-hundred dollar bill in her purse during the weekend of the crime, one additionally identifying the keys found in Smith's apartment as the

store keys issued to Roberts and the other, the victim's daughter, identifying as her mother's the purse, sweater, and tennis shoes found in Smith's possession or apartment that morning. A serologist testified that swabbings taken from Smith's hand tested positive for human blood but that the blood was too insubstantial to be typed. She also testified, however, that the blood on the khaki pants could have come from the victim and could not have come from Smith, and that the characteristics shared by the victim's blood and that blood could be expected to occur in the blood of less than 0.3% of the general population. A forensic scientist specializing in hair and fiber identification testified to the similarity of several hairs taken from Smith's bed covers and hairs taken from

the victim's head, testified that several pubic hairs taken from the bed and the sweater were Caucasian and matched the victim, and that one Negroid pubic hair taken from the pubic hair of the victim was similar to hairs taken from Smith. Officer Oatis and other members of the police department testified to the sequence of events on the morning of the crime and to the inspection of the red Pinto and Smith's apartment.

Smith was the only witness for the defense, and he presented an elaborate alibi. Smith testified that after returning from the party in MacDonald's car he was startled to find the lights on in his apartment and the radio playing, and that he had feared that someone was in his apartment. After knocking and receiving no response, he changed into a pair of pants, a shirt, and some shoes

that were left outside his apartment, then passed out on the porch, probably because someone had drugged him at the party. He awoke to see a shadow, tall and with a large Afro, on the right side of his house, and then left the apartment driving the Pinto. He explained that he had attempted to avoid the police in the convenience store parking lot because he was ferrying marijuana to a friend and because his driver's license was expired, and claimed that Oatis planted the shoe in his car. He acknowledged that the muddy pants and shoes were his, though he professed ignorance as to the cause of their condition, claimed that the two one-hundred dollar bills were his, and that he owned a pair of brass knuckles but had left them on his bed before attending the party. Smith denied having been to the convenience store before.

The state subsequently presented as a witness a clerk at the convenience store who had seen Smith in the store on several occasions, including once two days before the crime. Another witness testified that Smith had previously been arrested for disorderly conduct and resisting arrest, but admitted on cross-examination that the arrest record might indicate that a different person, with a different social security number, had been arrested. The prosecution's closing emphasized both the eyewitness and circumstantial evidence, while the defendant and his counsel professed innocence and ignorance of the crime. Defense counsel also attacked the credibility of Thomas and Wells, noted the unexpectedness of their testimony, and confessed that he had made a tactical error in allowing three persons who

interviewed Thomas on behalf of Smith to remain in the courtroom during Thomas' testimony, thereby disabling them from testifying as to his previous statements, but noted that Thomas had admitted at trial his failure to identify Smith during the interview. After deliberating for approximately one hour, Smith was convicted of the murder of Shirley Roberts during the course of a robbery, a capital crime in violation of Miss. Code Ann. § 97-3-19(2)(e) (1972 & Supp. 1989).

B. Sentencing Phase

During its case at the sentencing phase the state recalled the pathologist, who testified that the victim's vagina showed signs of recent sexual intercourse, and testified that a victim of manual strangulation would remain conscious for the first one or two

minutes and that death would take approximately five minutes. The state also recalled the serologist, who testified, over defense objection, that she had found numerous sperm cells in the vaginal washings of the victim; she admitted on cross-examination and re-cross examination that she could not identify any relationship between the sperm cells and the defendant. Smith presented six witnesses, including himself, in mitigation. The other witnesses, all relatives, essentially suggested that he was innocent and that his prior violent acts were not indicative of his character. Smith testified that he went to trial because he was innocent.

In its initial closing argument, the state concentrated on rebutting Smith's mitigating evidence, but also projected

slides showing the victim and alleged that Smith "sexually abused" Roberts. Defense counsel in turn stressed that Smith had been consistent in maintaining his innocence and appealed to the Christian mercy of the jurors. In explaining his own conduct and his client's wish to stand trial, he admitted that the circumstantial evidence was "overwhelming." In its second closing argument, the prosecution dwelled on the circumstances of the crime, repeatedly alleging that Smith had killed, robbed, kidnapped, and raped Roberts. The jury found three aggravating circumstances: that the murder was committed while Smith was engaged in the commission of robbery, that the murder was committed for pecuniary gain, and that the murder was especially heinous, atrocious, or cruel, and found beyond reasonable doubt that

the aggravating circumstances outweighed the mitigating circumstances. Miss. Code Ann. § 99-19-101 (1972 & Supp. 1989).

C. Post-trial Proceedings

Smith filed a motion for a new trial claiming some fifteen grounds for relief, and upon that motion's denial filed his automatic appeal to the Mississippi Supreme Court, which then affirmed his conviction and sentence in August 1982. Smith filed a petition for rehearing, and although the Mississippi Supreme Court modified its prior opinion it affirmed the conviction and sentence. Smith v. State, 419 So. 2d 563 (Miss. 1982). Represented by new counsel, Smith filed an unsuccessful petition for writ of certiorari with the United States Supreme Court, arguing ineffectiveness of trial counsel and unlawful seizure of evidence.

Smith v. Mississippi, 460 U.S. 1047, 103 S. Ct. 1449, 75 L. Ed. 2d 803 (1983).

Smith's subsequent petition for writ of error coram nobis was denied by the Mississippi Supreme Court, almost solely on the bases of procedural bars, and Smith's petition for rehearing was denied shortly thereafter. Smith v. State, 434 So. 2d 212 (1983). Smith filed a petition for writ of habeas corpus in this court, which entered a stay of execution and a stay of proceedings in the district court until state court remedies were exhausted. Smith then filed a second application in the Mississippi Supreme Court on the basis that the two eyewitnesses had perjured themselves at trial. The application was successful, and the court ordered an evidentiary hearing in circuit court on the issue. In re Smith, 457 So. 2d 911

(Miss. 1984). After holding the hearing the circuit court denied relief, and on appeal the Mississippi Supreme Court affirmed and denied a petition for rehearing. Smith v. State, 492 So. 2d 260 (Miss. 1986).

While the second state post-conviction petition was pending Smith filed a third motion in state court, seeking collateral relief under Miss. Code Ann. § 99-39-1 et seq. (1972 & Supp. 1989) on the grounds that the prosecutor had unconstitutionally excluded blacks from the jury and that the prosecution had failed to disclose certain evidence. The Mississippi Supreme Court denied the motion and denied rehearing. Smith v. State, 500 So. 2d 973 (Miss. 1986).

After entertaining an amended petition and memorandum and response, the

federal district court below denied habeas corpus relief to Smith, later denying as well a motion to alter or amend the judgment. Smith v. Thigpen, 689 F. Supp. 644 (S. D. Miss. 1988). It is this judgment which is presently on appeal.

The nature of the evidence against Smith and his grounds for seeking relief from the conviction and sentence are more fully described below. To summarize, Smith argues that the eyewitness testimony was perjured, that the state failed to disclose important impeachment evidence, that the state's use of an allegation of rape at the sentencing phase denied Smith due process, that Smith was denied effective assistance of counsel at trial, that Mississippi's use of the "especially heinous" aggravating circumstance was unconstitutional, that

the state's use of peremptory challenges to exclude blacks from the jury was unconstitutional, and that the district court erred in applying Mississippi's rules of procedural default and in denying Smith an evidentiary hearing. Each is considered in turn.

II.

A. Perjury

Smith argues primarily that Thomas and Wells lied at trial when they made an in-court identification of Smith as the perpetrator: subsequent, secretly taped conversations and formal interviews with the two witnesses, as well as their affidavits, substantially contradict their trial testimony. Smith has steadfastly objected in post-trial proceedings to the in-court identification by Thomas and Wells. After the Mississippi Supreme Court

rejected similar contentions in Smith's original appeal and first petition for writ of error coram nobis, Smith filed a second petition with affidavits from Thomas and Wells explaining that they had lied in their pre-trial and in-court identifications of Smith. The Mississippi Supreme Court granted Smith's petition, affording him a hearing in state trial court on the allegation of perjury; in so doing, the court observed that "[t]hese witnesses' identification of Smith at trial formed an integral part of our opinion affirming his conviction." See In re Smith, 457 So. 2d at 911. The lower court denied a new trial, and the Mississippi Supreme Court affirmed, concluding that although Thomas and Wells had perjured themselves, and the prosecution may have negligently used perjured testimony, the other evidence of

guilt allowed no reasonable probability that the outcome was affected by the testimony. Smith v. State, 492 So. 2d at 264. On habeas review, the federal district court below disagreed both with the Mississippi Supreme Court's determination that perjury had occurred and with the intimation that anything less than knowing use by the prosecution might afford relief. As to the former, the court agreed with the state trial court that the recanting statements of Thomas and Wells were more suspect than their trial testimony, and that the contrary conclusion by the Mississippi Supreme Court was not fairly supported by the record. Smith v. Thigpen, 689 F. Supp. 644, 656-57 (S. D. Miss. 1988) (citing 28 U.S.C. § 254(d)(8)). From that conclusion, the district court reasoned that the prosecution could not

be held to have known that the identifications were perjured. Id. at 657.

As a result, this case presents the rather unusual circumstance of the petitioner arguing for federal deference to state court fact-finding, cf. Sumner v. Mata, 449 U.S. 539, 547, 101 S. Ct. 764, 769, 66 L. Ed. 2d 722 (1981); Buxton v. Lynaugh, 879 F.2d 140, 142-47 (5th Cir. 1989), while the state would support the district court's re-reading of the record. As the district court recognized, there are situations when it is appropriate for a federal court to substitute its judgment on factual issues for that of the state court, even on habeas corpus review. However, that is unnecessary here: because we conclude that Smith needs to demonstrate knowing use of perjured testimony to secure

relief, and does not do so, we need not reach the issue of whether the Mississippi Supreme Court was incorrect in concluding that Wells and Thomas had committed perjury.[1/]

1/ The district court did not specifically discuss two other allegations of perjury. The second, which the Mississippi Supreme Court observed, was that Thomas lied at trial when he said that he had identified Smith at the lineup conducted the day after the murder. 492 So. 2d at 267. As explained below, Thomas clarified at trial that he had identified Smith, but not disclosed that identification to the prosecution; this explanation made sufficient sense that it would be difficult to conclude that Thomas had so perjured himself. The third, not discussed by the Mississippi Supreme Court, but mentioned at oral argument before this court, contends either that Wells lied at trial when he said that he had been alone when he identified Smith's picture as that of the assailant, or that Bartlett lied in the coram nobis hearing when stating that he did not leave Wells alone with pictures. Bartlett's presence is relevant to assessing Wells' post-trial suggestion that he was able to identify Smith's picture by the name on the back. This perjury allegation is not apparent in Smith's state or federal pleadings, and

(continued...)

Smith does not appear to suggest that the perjury itself creates grounds for a new trial, but rather argues that the prosecution's behavior with regard to the perjury amounted to a constitutional violation. In this context, as the district court noted, resolving the allegations of perjury is unnecessary if the prosecution did not know of the perjury. The Fifth Circuit has long abided by the standard requiring that for use of perjured testimony to constitute constitutional error, the prosecution must have knowingly used the testimony to obtain a conviction. See Mooney v. Holohan, 294 U.S. 103, 110, 112, 55 S. Ct. 340, 341-42, 79 L. Ed. 791 (1935)

1/(...continued)
we will not resolve it on appeal; we note, however, that Smith does not definitively frame an issue of trial perjury, but rather presents two inconsistent accounts, one of which was provided in post-trial proceedings.

(per curiam); Hawkins v. Lynaugh, 844 F.2d 1132, 1141 (5th Cir.), cert. denied, ___ U.S. ___, 109 S. Ct. 247, 102 L. Ed. 2d 236 (1988); Braxton v. Estelle, 641 F.2d 392, 395 (5th Cir. Unit A 1981); Skipper v. Wainwright, 598 F.2d 425, 427 (5th Cir.) (per curiam), cert. denied, 444 U.S. 974, 100 S. Ct. 469, 62 L. Ed. 2d 389 (1979).

Smith's argument for an extension of the negligence standard of United States v. Agurs, 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976), is not sufficiently convincing to override this practice. As the district court explained, Smith's use of Giglio v. United States, 405 U.S. 150, 152-54, 92 S. Ct. 763, 765-66, 31 L. Ed. 2d 104 (1972), to support the negligence standard is inapposite; Giglio concerned the particular circumstances of the nondisclosure of a promise of

nonprosecution made in exchange for witness testimony. Agurs afterward reported that the rule of Brady may "arguably" apply in the situation in which "undisclosed evidence demonstrates that the prosecution's case includes perjured testimony and that the prosecution knew, or should have known, of the perjury," but was clear in reporting the subsequently settled rule that knowing use of perjured testimony was fundamentally unfair. 427 U.S. at 103-04, 96 S. Ct. at 2397-98. The discussion in Agurs relied on by Smith more precisely refers to the materiality of nondisclosed evidence, a subject considered below in connection with his Brady claim.

Reviewed under the Mooney standard, and assuming without deciding that the in-court identification constituted

perjury, Smith does not establish that the prosecution knew. Cf. Braxton, 641 F.2d at 395. For the very reasons detailed by the district court toward the contention that the testimony was not perjury, 689 F. Supp. at 652-57, the prosecutors could reasonably have concluded that the inconsistency of Wells and Thomas related to a reluctance to testify. Both evidenced a detailed observation of the abduction in their initial contact with the police, although they indicated on that occasion and others preceding trial that they could not identify the culprit. Thomas, however, contended at trial that he had in fact recognized Smith at the police lineup, and had so informed the prosecution on the first day of trial. Thomas coherently explained his vacillations: he had refrained from

identifying Smith to the prosecution because of pressure he felt from relatives, and likewise had told Smith's sisters and defense counsel's son that he could not identify the perpetrator, but had to tell the truth when he was forced to testify under subpoena. Wells, the eyewitness whose testimony proved less damaging to Smith, simply testified that he had identified Smith at his first opportunity to do so, in the photographic lineup. The credibility of these explanations is cast into severest doubt by their after-trial recantations, but the prosecution cannot be charged with knowledge of their latent positions. We cannot conclude that what appears to have been the Mississippi Supreme Court's conclusion that the prosecution did not knowingly use perjured testimony, Smith v. State, 492 So. 2d at 267, was not

fairly supported by the record. Sumner v. Mata, 449 U.S. at 551-52, 101 S. Ct. at 771.

B. Continued Use of Perjured Testimony

Smith also argues that given present knowledge of perjury, his conviction cannot be left undisturbed. Smith relies on Sanders v. Sullivan, 863 F.2d 218 (2d Cir. 1988), which found that a state violates due process if it allows a conviction to stand after an eyewitness credibly recants material testimony. To be material, according to Sanders, perjured testimony "must be of an extraordinary nature[,] . . . leav[ing] the court with a firm belief that but for the perjured testimony, the defendant would most likely not have been convicted." Id. at 226. At its core, Sanders disputes the necessity of demonstrating prosecutorial involvement

in or knowledge of the perjured testimony. Id. at 224-25.

As Sanders itself notes, its pronouncement differs from the rule adhered to in the Fifth Circuit. See id. at 222 n. 2 (citing United States v. Jones, 614 F.2d 80, 82 (5th Cir.), cert. denied, 446 U.S. 945, 100 S. Ct. 2174, 64 L. Ed. 2d 801 (1980)). Given the understanding of United States v. Agurs expressed above, this court's rule appears more consistent with the view taken by the Supreme Court, and Smith does not present an argument for its change.

C. Failure to Disclose Exculpatory Material

Smith makes the related claim that the State withheld police investigative files critical to assessing the credibility of Thomas and Wells, in particular to assessing the credibility

of the identification by Thomas and Wells. According to Smith's amended habeas petition, the withheld files contained:

> (1) written statements by Thomas and Wells stating that they could not identify Roberts' assailant; (2) a lineup report showing that Thomas was unable to pick Smith out of a lineup shortly after the incident; (3) the reports of the investigating officers demonstrating that Thomas and Wells were not able to describe either the Roberts' assailant [sic] or his car with any detail when they first spoke to the police and the District Attorney's officer; and (4) the notes of the police radio communication calls, indicating the very limited informations given by Thomas and Wells to the investigation police officer, Sgt. Oatis, in the Tote-Sum store parking lot just twenty minutes after the incident that occurred there. Such information was obviously critical to Petitioner's case: not only for purposes of impeaching the testimony of Thomas, Wells and the State's other witnesses at trial, but also for purposes of impeaching Sgt. Oatis' testimony at the suppression hearing. [Record citations omitted].

Most striking are the sworn statements from Thomas and Wells and their summary

by a police detective: taken the day after and three days after the crime, respectively, they fail to provide any more information about the perpetrator than that he was a black male. In Wells' sworn statement, he summarized his identification in response to questioning:

> Q: Would you know this man if you saw him again.
> A: I don't think I would I did not get a good look at him.
> Q: Do you think that you would recognize the car if you saw it again.
> A: I don't think I could I did not get a good look at it either.

The Mississippi Supreme Court appears to have assumed that the information was not in fact provided to Smith or his trial counsel by the prosecution, but instead first surfaced at the second coram nobis hearing. 500 So. 2d at 979; see also 492 So. 2d at 264. Focusing particularly on the

witness statements from Thomas and Wells, however, the court concluded that the information they contained was not favorable to Smith and in any event was not such as to undermine confidence in the outcome of the trial. 500 So. 2d at 979. On habeas review the district court below substantially agreed, rejecting Smith's claim for three reasons: first, the state substantially complied with Smith's request; second, Smith substantially knew the testimony of Thomas and Wells, effectively answering his own request; and third, the police record contained no evidence "favorable" to Smith, and thus under Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), need not have been disclosed, at least not before the witnesses testified. 689 F. Supp. at 658.

Successful establishment of a Brady claim requires three findings: (1) that evidence was suppressed; (2) that this evidence was favorable to the accused; and (3) that the evidence was material either to guilt or punishment. Brogdon v. Blackburn, 790 F.2d 1164, 1167 (5th Cir. 1986) (per curiam), cert. denied, 481 U.S. 1042, 107 S. Ct. 1985, 95 L. Ed. 2d 825 (1987).

1. Suppression or Nondisclosure of the Evidence

Smith moved for discovery of any Brady material in a discovery request filed May 28, 1981, and the district court ordered compliance through in camera inspection in an order dated June 19, 1981. Under United States v. Agurs, 427 U.S. at 106-07, 96 S. Ct. at 2399, Smith's claim is not mooted by a failure to request information with greater specificity; United States v. Bagley, 473

U.S. 667, 682, 105 S. Ct. 3375, 3383-84, 87 L. Ed. 2d 481 (1985), in collapsing Brady's distinction between the categories of requests, presumably reinforces this notion.[2/]

The state conceded at the coram nobis hearing that it would have possessed and inspected the police files, and has not contended at any point in this extended litigation that the reports were received by Smith or his counsel, instead focusing on whether the

---

2/ However, Bagley did regard the request's specificity as pertinent to the assessment of materiality, in that "an incomplete response to a specific request not only deprives the defense of certain evidence, but also has the effect of representing to the defense that the evidence does not exist." The Court noted that specificity did not affect the different standard of review, but figured only as one aspect of the "totality of circumstances," and that the necessary "but for" inquiry might prove difficult to conduct on appeal. 473 U.S. at 682-83, 105 S. Ct. at 3383-84. Cf. Lindsey v. King, 769 F.2d 1034, 1041 (5th Cir. 1985).

information was otherwise made known to them. The district court essentially agreed, suggesting the defense functionally received the evidence, since "Smith knew that Thomas and Wells had not identified him to the police, and Smith obtained statements from Thomas and Wells stating they could not identify him." 689 F. Supp. at 658. This analysis goes at most to the issue of materiality. Smith at no point in the trial evidenced knowledge that neither Thomas nor Wells had been able to describe the assailant in statements to the police made shortly after the victim's death, and knowledge of other sources of impeachment does not deprive him as a threshold matter of the right to additional, discrete bases for impeachment residing in material possessed by the prosecution. Moreover, Smith argues that the nondisclosure

impaired his ability to impeach Oatis' testimony at the suppression hearing, an application for which the timing of the disclosure was critical.

2. Exculpatory Nature of Evidence

The district court also concluded that the information in the police record was not sufficiently "favorable" to Smith to qualify under Brady, as "Smith could have used the record only as a source of additional prior inconsistent statements to impeach the state's witnesses." Id. at 658. Again, this is only an assertion that the material's revelation would have been immaterial to the outcome, as impeachment material is clearly exculpatory and qualifies as Brady material. United States v. Bagley, 473 U.S. at 676, 105 S. Ct. at 3380; United States v. Irwin, 661 F.2d 1063, 1068 (5th Cir. 1981), cert. denied, 456 U.S. 907,

102 S. Ct. 1754, 72 L. Ed. 2d 164 (1982); United States v. Anderson, 574 F.2d 1347, 1355 (5th Cir. 1978). This is true as well of material that provides an additional, but not exclusive, basis for impeachment. See Monroe v. Blackburn, 607 F.2d 148, 152 (5th Cir. 1979), cert. denied, 446 U.S. 957, 100 S. Ct. 2929, 64 L. Ed. 2d 816 (1980).

The nondisclosed statements of Thomas and Wells were not sheerly redundant, but rather constituted the most contemporary appraisals of their alleged observation of Smith, and combined with their failure to previously identify Smith as the person they observed cast doubt on the credibility of their latent identifications and on the testimony of Oatis. The statements are more than merely cumulative; Thomas and Wells both evidence an inability to

describe the assailant, a distinct cognitive exercise from the identification of a suspect as the assailant. Equally important, the statements are less easily explicable than the inconsistencies stressed by Smith's counsel in his cross-examination of Thomas and Wells, which were excused at trial as the product of various pressures brought to bear on the eyewitnesses. A jury might reasonably doubt the credibility of witnesses who, had earlier sworn ignorance before the police as well.

3. Materiality

In United States v. Bagley, a majority of the Supreme Court imported the materiality test of Strickland v. Washington for use in all cases involving

> [Prosecutorial] failure to disclose evidence favorable to the accused: The evidence is material only if there is a

> reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome.

473 U.S. at 682, 105 S. Ct. at 3383 (opinion of Blackmun, J.); id. at 685, 105 S. Ct. at 3385 (opinion of White, J.); see also Pennsylvania v. Ritchie, 480 U.S. 39, 55-59, 107 S. Ct. 989, 1001-02, 94 L. Ed. 2d 40 (1987).

Smith's discussion of his Brady claim is unfortunately synchronized with his perjury claim, leading him to identify all aspects of the police record that would cast doubt on the trial testimony of Thomas and Wells. Brady does not extend so far: the doctrine exempts information that the defense could have obtained from other sources by exercising reasonable diligence, see, e.g., United States v. Bi-Co Pavers,

Inc., 741 F.2d 730, 736 (5th Cir. 1984), and to the extent that Smith's argument rests on supposed revelations like the difficulties of precise identification in the pre-dawn hours, across a parking lot, and from a moving vehicle, it must fail.

The nondisclosed statements made by Thomas and Wells to the police, however, present a much closer issue. As suggested above, the statements and their verification by other elements of the police record are relevant to several stages of trial.

(a) Suppression Hearing

First, Smith has consistently suggested since their disclosure that he was materially impaired in his ability to impeach Oatis' testimony at the suppression hearing, which related to the seizure without warrant of items from the defendant's home and from the car he had

borrowed. At that hearing, Oatis described Thomas and Wells' description of the suspect and his vehicle as follows:

> Black male subject, medium Afro, medium dark complexion, rather short stature. They went on to describe mostly his vehicle. Q: What description did they give you of the vehicle? A: They stated that it was a red Pinto, approximately a '70 model. That the vehicle possibly had a decal of some type in the back of the vehicle.
>
> * * * * *
>
> A: Vehicle appeared to have -- excuse me -- appeared to have a -- a part of the grill cracked or broken in the front of the vehicle. Also some light color material appeared to on the dashboard of the car. After I asked for a special identification on the vehicle, that's what they told me.
> Q: What kind of material would you say it was on the dash of the vehicle?
> A: I believe they stated it was some type of material resembling carpeting.
> Q: At the time they told you about the car and the black male, what exactly was the next thing that you did?

> A: At that time, I immediately radioed for all the units to be on the lookout for such a vehicle.

The police records indicate a significantly less detailed description of the suspect and his car, and Thomas and Wells later renounced the additional details as manufactured under pressure from the police. Not having the information garnered from the personal interviews of the putative eyewitnesses, who were under no obligation to cooperate with the defense, and not having benefit of cross-examination and disclosures such as would later occur at trial, Smith was severely handicapped in his ability to impeach Oatis by the nondisclosure of the witness statements, police reports, and notes from the radio call.

Timing is critical to proper Brady disclosure, see United States v. Peters, 732 F.2d 1004, 1008-09 (1st Cir. 1984),

and objections may be made under Brady to the state's failure to disclose material evidence prior to a suppression hearing. See, e.g., United States v. Lanford, 838 F.2d 1351, 1355 (5th Cir. 1988); United States v. Xheka, 704 F.2d 974, 982 (7th Cir.), cert. denied, 464 U.S. 993, 104 S. Ct. 486, 78 L. Ed. 2d 682 (1983) _)[3/] Such claims are not proscribed by Stone v. Powell, 428 U.S. 465, 96 S. Ct. 3037, 49 L. Ed. 2d 1067 (1976). Although we have previously held Brady claims to be foreclosed on habeas review because of Stone, see O'Quinn v. Estelle, 574 F.2d 1208, 1209-10 (5th Cir. 1978), cert. denied, 440 U.S. 919, 99 S. Ct. 1239, 59 L. Ed. 2d 469 (1979), and the district

---

3/ Because this case entails review of a state criminal conviction, we need not confront any tension between this requirement and the Jencks Act. Cf. United States v. Campagnuolo, 592 F.2d 852, 859-60 (5th Cir. 1979).

court here required Smith to establish that the suppression hearing was not "full and fair" within the meaning of Stone, 689 F. Supp. at 659, Smith's claim is transparently of the variety falling without Stone, since it attempts to measure the breach of a right arising under the Constitution rather than presenting a claim primarily relying on the exclusionary or another judge-made rule. See Brady, 373 U.S. at 87, 83 S. Ct. at 1196-97; cf. Stone, 428 U.S. at 495 n. 37, 96 S. Ct. at 3052-53 n. 37; Kimmelman v. Morrison, 477 U.S. 365, 375-83, 106 S. Ct. 2574, 2583-87, 91 L. Ed. 2d 305 (1986).

The appropriate assessment for Brady purposes, of course, is whether nondisclosure affected the outcome of the suppression hearing. Notwithstanding the statements provided by Thomas and Wells,

and the terse notes made from the police radio communication, the factfinder might have believed Oatis' contention that the eyewitnesses were initially more forthcoming regarding the description of the suspect and his vehicle. Even if he were disbelieved, the uncontradicted account in the log of police radio communication would have the police alerted at 5:37 a.m. to watch for a "B/M in RED FORD PINTO." Another police officer, Grice, testified at the suppression hearing that he was told by Oatis upon arriving at the crime scene at approximately 5:40-5:45 a.m. that they were looking for a red Pinto. According to his testimony at the suppression hearing, at around 6:15 or 6:20 a.m., Oatis, still at the Tote-Sum store, observed a black man in a red Pinto approach. The car, the only one on the

street at that time, then "[suddenly]" and "hastily" executed a U-turn and drove away. Oatis testified without contradiction at the suppression hearing that Smith had executed this turn in a car wash located "a few yards away" from his location, and Smith testified at the same hearing that he had reversed direction upon seeing a number of lights and suspecting that the police cars were assembled to check licenses. While pursuing Smith, Oatis testified, he observed Smith place something below him and to the right side of the car, and testified that when stopped Smith could not produce a driver's license and became belligerent. Oatis then testified that he saw through the window of the Pinto the mate to the shoe he had found in the parking lot, whereupon he arrested and handcuffed Smith. Oatis explained that

he did not notice the blood and mud on Smith's hands until after the arrest. Smith did not deny turning the vehicle around abruptly to avoid the police, but testified that Oatis had only observed him drop a cigarette and that the police must have planted the shoe in his car.

We cannot say that a factfinder presented with this account, and thus aided by the nondisclosed evidence and lacking the supposed embellishment by Oatis, would have decided to suppress the evidence and thus disturb also the accumulation of proof against Smith cultivated by the search of his apartment. An officer may conduct an investigative stop of a moving vehicle based upon a reasonable suspicion of criminal activity. See e.g., United States v. Sharpe, 470 U.S. 675, 682, 105 S. Ct. 1568, 1573, 84 L. Ed. 2d 605

(1985) (citing cases). The police possessed information that reasonably attracted their attention to Smith, quite apart from the fact that his was the only car on the neighboring streets at that hour of the morning, and his evasive maneuver confirmed their suspicion. See, e.g., Scruggs v. State, 412 So. 2d 732, 734 (Miss. 1981); cf. United States v. Hasette, 898 F.2d 994, 995 n. 2 (5th Cir. 1990) (per curiam) (citing cases regarding vehicular evasion of temporary checkpoints); Boches v. State, 506 So. 2d 254, 264 (Miss. 1987) (same). Smith does not suggest on appeal that evaluation of the conduct of the post-stop investigation -- the sighting of the missing shoe, the arrest of Smith, the questioning of MacDonald, or the search of Smith's apartment -- was otherwise

adversely influenced by the nondisclosure.

(b) Guilt Phase

Smith does not suggest on appeal any complicated trial dynamic resulting from the nondisclosure, except to suggest in passing that his trial counsel's defense theory was upset by the testimony of Thomas and Wells;[4/] rather, he argues simply that the eyewitness testimony was essential to the conviction and sentence

---

4/ Bagley evidences concern with "any adverse affect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case." 473 U.S. at 683, 105 S. Ct. at 3384. Smith's suggestion that the eyewitness testimony upset his trial counsel's strategy, however, is unconvincing. The defense knew the identity of the witnesses, alluded to them in his opening statement, and did not object to their appearance at trial. Moreover, because his Brady request was general in nature, he cannot claim that the nondisclosure convinced him that the state had no recorded contact with Thomas and Wells. See id. at 682-83, 105 S. Ct. at 3383-84.

of death, and that the absence of the police records made Thomas and Wells seem more credible in their trial testimony. The importance of impeaching witnesses is implicit in the Brady cases regarding impeaching evidence as material. See, e.g., United States v. Bagley, 473 U.S. at 676, 105 S. Ct. at 3380; Agurs, 427 U.S. at 113 n. 21, 96 S. Ct. at 2402 n. 21; Giglio v. United States, 405 U.S. 153-55, 92 S. Ct. at 765-66; United States v. Irwin, 661 F.2d at 1068 (5th Cir. 1981); Hudson v. Blackburn, 601 F.2d 785, 789 n. 6 (5th Cir. 1979), 444 U.S. 1086, 100 S. Ct. 1046, 62 L. Ed. 2d 772 (1980); United States v. Anderson, 574 F.2d at 1355. It is a commonplace that eyewitness testimony is highly regarded by juries, rather more than its objective appraisal might warrant. See e.g., Kampshoff v. Smith, 698 F.2d 581, 585-87

(2d Cir. 1983); United States v. Beasley, 576 F.2d 626, 633 (5th Cir. 1978), cert. denied, 440 U.S. 947, 99 S. Ct. 1426, 59 L. Ed. 2d 636 (1979). Accordingly, this court has on a number of occasions observed that the nondisclosure of evidence that could be used to impeach a key witness constitutes a Brady violation warranting a new trial. See, e.g., Lindsey v. King, 769 F.2d at 1042-43; Monroe v. Blackburn, 607 F.2d at 152; Martinez v. Wainwright, 621 F.2d 184, 188 (5th Cir. 1980); Jackson v. Wainwright, 390 F.2d 288, 298-99 (5th Cir. 1968); Guerrero v. Beto, 384 F.2d 886 (5th Cir. 1967) (per curiam).

The materiality of Brady material depends almost entirely on the value of the evidence relative to the other evidence mustered by the state. In Lindsey v. King, for example, this court

found that the state's case rested on two eyewitnesses who identified the defendant and one nonidentifying eyewitness. The state did not disclose an earlier statement by one of the identifying eyewitnesses that he did not see the perpetrator's face. Although the other eyewitness' testimony was unshaken, the court concluded that the identification by two unshaken witnesses was critical to the trial, particularly in light of the poor circumstances for identification and the defendant's contention that his companion, who "bore a striking resemblance" to the defendant, had in fact committed the crime. 769 F.2d at 1042-43. In Monroe, this court held that notwithstanding strongly corroborating physical evidence, the prosecutor's failure to turn over statements made by an eyewitness to the police constituted a

Brady violation. Even though the witness admitted on cross-examination that "he did not get a good look at the robber and was not able positively to identify [the defendant] as the robber when he was brought back to the scene," the court held that the absence of any reference in the police statement to a noise that the witness stated at trial he had heard went "directly to a substantive issue and could be used in urging that the in-court testimony has been 'improved' by the erroneous addition of what the prosecution needed to support its theory." 607 F.2d at 152.

In evaluating the case against Smith, we must avoid, as Lindsey cautioned, an "arithmetical approach" to redacting the nondisclosed evidence, 769 F.2d at 1042, and instead attend to "what the convicting jury had before it as

opposed to what the new jury will not." Smith v. State, 492 So. 2d at 266. In ordering a coram nobis hearing on the issue of perjury, the Mississippi Supreme Court noted that the "witnesses' identification of Smith at trial formed an integral part of our opinion affirming his conviction," In re Smith, 457 So. 2d at 911 (Miss. 1984), and the district court acknowledged that Thomas and Wells were "valuable witnesses." 689 F. Supp. at 649.

This understood, we cannot conclude that our confidence in the outcome is undermined by the Brady violation. First, the persuasive value of the police records as impeachment material for Thomas and Wells is less than crystalline. Wells, for example, admitted at trial that he had never before the photographic lineup been able

to identify Smith as the perpetrator, that he was able to indicate Smith in the courtroom because he was distinctively positioned and clad, and, ultimately, that he could not identify Smith as the perpetrator. Thomas, a convicted armed robber, admitted that he had not identified Smith at the lineup, that he had previously stated that he could not identify the perpetrator, and that he had seen Smith at the suppression hearing. Both men admitted that they had previously lied to avoid identifying Smith, that they had just identified him before trial, and that one way they could identify Smith was simply because of his involvement with the proceedings. Although their impeachment was not as complete as it would be had they possessed the nondisclosed records, see Hudson v. Blackburn, 601 F.2d at 789, it

was sufficiently complete to diminish the materiality of the Brady materials. See, e.g., United States v. Xheka, 704 F.2d at 983. The remaining credibility of the eyewitnesses, precariously balanced on their latent realizations and fears of subpoenas, could not be impeached by the materials.

Second, and equally important, the circumstantial evidence presented by the state was objectively overwhelming. Smith drove by the scene of the crime in a vehicle like that unequivocally described by at least one eyewitness and attempted to evade the police just forty-five minutes or so after the abduction of the victim. In his car was the matching shoe to one found in the Tote-Sum parking lot. Also in the parking lot was a pair of brass knuckles arguably identical to a pair he

admittedly possessed. His hand was stained with human blood. In his apartment, on his bed, was the victim's sweater and purse, and on the floor were items of his clothing covered with mud and blood. The blood on his pair of khaki pants was almost certainly that of the victim. Hair likely to have been the victim's was found on the bed. Two one hundred dollar bills arguably belonging to the victim were distributed between his discarded pants and the pair he was wearing when arrested. The victim's body was partially buried fifty yards behind his apartment building. Her head bore wounds made by a blunt instrument, and her pubic hair contained a pubic hair similar to Smith's.

In response to this case, and the eyewitness testimony, Smith offered an alibi that was simply implausible.

Without producing any corroborating physical proof or witnesses, Smith suggested in essence that another had taken uncontested control of his apartment, taken advantage of Smith's mysterious collapse to don clothing that Smith had chosen to doff, borrowed the car Smith had previously borrowed, abducted the victim, returned to Smith's apartment, killed and hidden the victim, removed Smith's clothing, and departed just as Smith awoke and saw the perpetrator's shadow. One witness for the state said that Smith had been inside the Tote-Sum store shortly before the crime, contradicting Smith's claim to have never been there. The jury was entitled to disbelieve the rest of his account. Unlike Lindsey, which produced a tangible person of very similar appearance at the scene of the crime, 769

F.2d at 1042-43, Smith did not make an effective case for mistaken identity; unlike Monroe, circumstantial evidence connected Smith with the crime, the victim's possessions, and the victim's body. 607 F.2d at 149, 152. Although the state ought to have disclosed the police records, and although the conduct of the trial may have been affected by their failure to do so, we cannot conclude that there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. See, e.g., United States v. Weintraub, 871 F.2d 1257, 1262-64 (5th Cir. 1989); Chaney v. Brown, 730 F.2d 1334, 1350 & n. 21 (10th Cir. 1984).

(c) Punishment Phase

Smith also argues that the nondisclosure of evidence affected the sentencing phase by contributing to the removal of residual doubt. The trial court rejected Smith's proffer of an instruction detailing residual doubt as a mitigating circumstance, but its instructions did permit the jury to entertain doubt in that fashion, and Smith's trial counsel repeatedly stressed the possible innocence of his client in his closing at the sentencing phase. We have previously recognized such reargument of guilt as a sound strategy. Stringer v. Jackson, 862 F.2d 1108, 1116 (5th Cir. 1988). Although Smith was not constitutionally entitled to instruct the jury to consider such residual doubt, Franklin v. Lynaugh, 487 U.S. 164, 174-77, 108 S. Ct. 2320, 2327-28, 101 L.

Ed. 2d 155 (1988), the Supreme Court has subsequently recognized a difference between rules relating to what mitigating evidence the jury may consider and rules relating to instructing the jury how to consider such evidence. Saffle v. Parks, ___ U.S. ___, ___, 110 S. Ct. 1257, 1261, 108 L. Ed. 2d 415 (1990). Here the claim is still simpler: Smith asks not for a revision of the court's determination of what evidence he may present to the jury, but only that we assess the materiality of the Brady violation in light of the mitigating case actually presented for him. We agree that nondisclosure of impeachment evidence may be relevant to the punishment phase, see Lindsey v. King, 769 F.2d at 1042, and reject the intimation that this aspect of Smith's claim may have no constitutional footing. Cf. Jones v. Butler, 864 F.2d 348, 357

(5th Cir. 1988) (alternative holding), cert. denied, ___ U.S. ___, 109 S. Ct. 2090, 104 L. Ed. 2d 653 (1989).

For the reasons expressed above, however, we seriously doubt that disclosure of the Brady materials would have affected the jury's view of Smith's innocence. Smith presented no more evidence suggesting his innocence, and his witnesses in mitigation were of little assistance; his mother testified that he had been previously involved in two shootings, allegedly in self-defense, and his aunt confirmed that in one of the incidents a child had been shot. The state also presented evidence that the victim had been sexually assaulted, and argued without material contradiction -- but for the suggestion that Smith was innocent of wrongdoing -- that Smith's crime had involved robbery, kidnapping,

and a brutal slaying. We conclude that the jury's residual doubt would not have been materially affected by compliance with Brady.

D. Accusations of Rape at Sentencing Proceeding

Smith objects to the prosecution's presentation of evidence during the sentencing phase that suggested Smith had raped the victim before her death, and to the prosecution's emphasis on that allegation during argument to the jury regarding the aggravating circumstances surrounding the crime. First, he argues that the use of the rape allegation in support of an aggravating circumstance amounted to (or perhaps was analogous to) being convicted of a crime without being so charged or being sentenced for a crime without being so convicted. Second, Smith argues that alleging commission of a rape while knowingly being unable to

offer competent evidence violated "fundamental fairness." Third, Smith argues that "death sentences must 'be, and appear to be, based on reason rather than caprice or emotion.' Gardner v. Florida, 430 U.S. 349, 358 [97 S. Ct. 1197, 1204, 51 L. Ed. 2d 393] (1977)." In support of this argument, he contends that the State unfairly surprised defense counsel with the rape testimony and argument at the sentencing phase, as well as unduly interjecting an emotional and volatile allegation into the proceedings without basis in fact.

The conduct cited to support Smith's allegations was not discussed by either the Mississippi Supreme Court or the district court below, warranting brief review here. Although the prosecution initially sought indictment for capital murder during the course of rape, the

grand jury returned an indictment for murder during the course of robbery. Nevertheless, during his voir dire of the first panel of potential jurors, the prosecutor began by reporting that "[a]s the Judge has told you briefly, this defendant is charged with having seized a person, taken them against their will, robbed them, raped them and murdered them." An objection to the rape reference on the grounds that it was not contained in the indictment was sustained, but no cautioning instruction was given. During questioning of a second panel, the prosecutor asked whether any of the potential jurors "ever had a sister or a mother or a brother that's been raped, abducted, murdered or robbed?" Defense counsel objected on the same grounds as before but was overruled.

During questioning of the examining pathologist at trial, the prosecutor was cautioned by the judge not to discuss vaginal swabs taken from the victim that afforded an inconclusive comparison to a semen sample taken from Smith. The prosecutor later introduced evidence that found similarity between pubic hair recovered from the pubic hair of the victim and a sample submitted from Smith, and also found similarity between head and pubic hair sample taken from the victim and pubic hair recovered from bed clothing and a sweater found in Smith's bedroom and head hair recovered from the bed clothing. The testimony regarding the comparison focused chiefly on the racial characteristics of the samples. The evidence was admitted over defense counsel's objections and motion for mistrial on the grounds that "[t]he

prosecution obviously is attempting to inflame this jury by offering proof before this jury of another crime, namely rape, which is not charged in the indictment." The prosecutor also introduced evidence that the victim's shirt was on inside out and that her bra was pulled up when her body was recovered from behind Smith's apartment. Speaking generally to Smith's allegations, the district court concluded that "the prosecution carefully guarded against any reference to rape at the quilt phase of the trial, repeatedly cautioning its witnesses to avoid any reference to those allegations. The prosecution had to caution them because the evidence of sexual abuse was substantial and apparent to everyone. It is obvious that the motive of this crime was not simply robbery." 689 F. Supp. at 660. This

evidence was later resubmitted to the jury during the sentencing phase. In addition, the prosecution recalled the forensic pathologist who had performed the autopsy, this time to testify that he had found evidence of recent sexual intercourse. The prosecution also recalled the serologist who had testified at the guilt phase regarding the comparison of blood samples, who testified in her second appearance that vaginal swabs taken from the victim revealed numerous sperm. Defense counsel unsuccessfully objected on the grounds that the testimony did not correspond to the indictment and was inflammatory. On cross-examination, the serologist admitted that she was unable to identify the sperm and semen taken from the victim as that of Smith, which the prosecution had previously admitted during a

conference out of the presence of the jury during the guilt phase. During their summations to the jury during the sentencing phase, the prosecutors referred twelve times to the allegation that Smith had raped the victim, and the judge overruled defense counsel's objection following a reference to the serologist's discussion of the sperm sample taken from the victim. During both closing arguments the prosecution displayed a slide of the victim's body. Following defense counsel's unsuccessful objection to the continued display of the slide, the lead prosecutor suggested to the jury the following:

> Do you know why they didn't want that on? Do you know why they didn't want that on? Because they didn't want you to see her shirt on inside out. They didn't want you to see that brassiere pulled up around her neck. They didn't want you

> to remember that, in addition to killing her, robbing her, kidnapping her, that he raped her. And we don't know how many times. All we know is that Mrs. Ard [the serologist] said numerous -- and she stressed numerous -- sperm cells.

Although the jury was not charged with the option, available under the Mississippi sentencing statute, of deciding on rape or sexual battery as an aggravating factor, it was charged with determining whether the crime was heinous, and found heinousness as one of three aggravating factors necessitating the death penalty.

1. Procedural Bar

On collateral review of this claim, the Mississippi Supreme Court held that it was barred because it was not raised on direct review. Smith v. Mississippi, 434 So. 2d 212, 216 (Miss. 1983). The district court, although receptive to

procedural bars with regard to other claims, 689 F. Supp. at 661-63, did not discuss any procedural impediments to this claim. On appeal to this court, the state appears to infer that the district court's decision was based on the ruling of Johnson v. Thigpen, 623 F. Supp. 1121, 1127-28, aff'd, 806 F.2d 1243 (5th Cir. 1986), cert. denied, 480 U.S. 951, 107 S. Ct. 1618, 94 L. Ed. 2d 802 (1987) (S. D. Miss. 1985), and does not dispute the continued vitality of the claim. Br. at 19 n. 1. Smith, in turn, views the state to have conceded the incorrectness of the state court's decision. Reply Br. at 10. Since counsel objected at trial, since direct appeal was taken prior to the Mississippi Supreme Court's decision in Wheat v. Thigpen, 431 So. 2d 486 (Miss. 1983), and since that court plainly relied on the newly restrictive rule it

had announced in Edwards v. Thigpen, see Smith, 434 So. 2d at 216, Smith has not procedurally defaulted on his claim by failing to appeal the error on direct review in state court. Edwards v. Scroggy, 849 F.2d 204, 209 n. 4 (5th Cir. 1988), cert. denied, ___ U.S. ___, 109 S. Ct. 1329, 103 L. Ed. 2d 597 (1989); Wheat v. Thigpen, 793 F.2d 621, 625-26 (5th Cir. 1986); Johnson v. Thigpen, 623 F. Supp. at 1127-28; Edwards v. Thigpen, 595 F. Supp. 1271, 1278-79 (S. D. Miss. 1984).

2. Merits

(a). Conviction For An Unindicted Crime

As the district court observed, Smith's allegation that he was convicted for a crime for which he had not been charged and which had not been proven, in violation of the rule of Presnell v. Georgia, 439 U.S. 14, 99 S. Ct. 235, 58

L. Ed. 2d 207 (1978), is without merit, as it implies the presence of a discrepancy between the guilt and punishment determinations which is not present in this case. Presnell reversed a decision by the Georgia Supreme Court which found that the jury had not properly convicted the defendant of any capital offense, but had then upheld a death sentence upon concluding that the evidence supported the defendant's guilt of a capital crime despite the lack of a jury finding. Id. at 16, 99 S. Ct. at 236. Smith was duly convicted of a capital crime and sentenced to death after the jury found the aggravating factors of robbery, pecuniary gain, and heinousness. The district court observed that rape allegations were probably argued in support of the factor that the murder was especially heinous, atrocious

or cruel. 689 F. Supp. at 660. It cannot be concluded that Smith was convicted of a charge that was never made or tried by jury, see Cole v. Arkansas, 333 U.S. 196, 201-02, 68 S. Ct. 514, 517, 92 L. Ed. 2d 644 (1948), or that he is being punished on the assumption of same.

(b) Surprise

Smith's account of the focus on rape at sentencing also makes out the allegation that his defense was "ambushed" without notice by the sudden emphasis at sentencing on the rape allegation. Understood narrowly as an evidentiary objection, it is doubtful that Smith has preserved the claim for federal review. Specific objections to surprise caused by untimely revelations that the pathologist and serologist would testify were last raised in Smith's first petition for collateral review before the

Mississippi Supreme Court, where they were deemed procedurally barred. 434 So. 2d at 218. Federal habeas corpus review of such unfair surprise claims looks to state procedure for objection and continuance. Davis v. Maggio, 706 F.2d 568, 570-71 (5th Cir. 1983); Smith v. Estelle, 602 F.2d 694, 701 n. 8 (5th Cir. 1979), aff'd, 451 U.S. 454, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981). In Mississippi, trial courts confronting discovery violations are to require defense objection, afford a reasonable opportunity to review the evidence, then require that the defense request a continuance. See. e.g., Cole v. State, 525 So. 2d 365, 367-68 (Miss. 1987), cert. denied, ___ U.S. ___, 109 S. Ct. 330, 102 L. Ed. 2d 348 (1988). Smith's counsel neither objected on the grounds of surprise nor requested a continuance,

although he later objected to the prosecution's use of the evidence during its closings. Cf. In re Hill, 460 So. 2d 792, 800 (Miss. 1984).

Assuming without deciding that this particular aspect of Smith's claim is properly before this court, it is not persuasive. It is revealing that Smith initially sought habeas relief on the basis that the state unfairly injected allegations of rape into the guilt phase as well: even if the prosecution emphasized the rape allegation less at the guilt phase than it did during sentencing, it cannot be said that the subject came as a surprise at the punishment phase. With regard to the serologist's testimony regarding the semen samples, Smith may have been justified in depending on the judge's determination at the guilt phase that the

evidence could not be offered to identify him, but his counsel successfully brought out on cross-examination at the punishment phase the very lack of conclusiveness that weighed against the evidence at its initial proffer.

(c) Fundamental Unfairness

Read more broadly, Smith's claim alleges that the sudden shift in emphasis at sentencing, the references to evidence known to be inconclusive, and the inflammatory argument of the prosecution combined to violate his due process rights. Smith's surprise argument could also be understood more broadly as evoking the caution of Gholson v. Estelle that "[i]f a person is to be executed, it should be as a result of a decision based on reason and reliable evidence -- not as a result of ambush." 675 F.2d 734, 738 (5th Cir. 1982).

Smith does not suggest that the prosecution thereby violated any specific guarantee of the Bill of Rights,[5/] but rather that its conduct of the trial infected the trial with unfairness. The court below accurately summed up the accepted standard of review:

> On a writ of habeas corpus, the appropriate standard for review of the claims of improper argument by the prosecution is "the narrow one of due process, and not the broad exercise of supervisory power." Darden v. Wainwright, 477 U.S. 168, 181, 106 S. Ct. 2464, 2472, 91 L. Ed. 2d 431, 436 (1986) (citing Donnelly v. DeChristoforo, 416 U.S. 637, 642, 94 S. Ct. 1868, 1871, 40 L. Ed. 2d 431, 436 (1974)). The relevant question, therefore, is whether "the prosecutor's comments 'so infected the trial with unfairness as to make the

---

5/ Cf. Donnelly v. DeChristoforo, 466 U.S. 637, 643, 94 S. Ct. 1868, 1871, 40 L. Ed. 2d 431 (1974); Rogers v. Lynaugh, 848 F.2d 606, 608 (5th Cir. 1988); O'Bryan v. Estelle, 714 F.2d 365, 387 (5th Cir. 1983), cert. denied, 465 U.S. 1013, 104 S. Ct. 1015, 79 L. Ed. 2d 245 (1984).

> resulting conviction a denial of due process.'" Id. It is "not enough that the prosecutors' remarks were undesirable or even universally condemned." Id. 477 U.S. at 181, 106 S. Ct. at 2472, 91 L. Ed.2d at 157.

689 F. Supp. at 660. The test was put more concretely in Felde v. Blackburn:

> To establish that a prosecutor's remarks are so inflammatory as to prejudice the substantial rights of a defendant, the petitioner must demonstrate either persistent and pronounced misconduct or that the evidence was so insubstantial that (in probability) but for the remarks no conviction would have occurred.

795 F.2d 400, 403 (5th Cir. 1986), cert. denied, 484 U.S. 873, 108 S. Ct. 210, 98 L. Ed. 2d 161 (1987); see also Jones v. Butler, 864 F.2d 348, 356 (5th Cir. 1988), cert. denied, ___ U.S. ___, 109 S. Ct. 2090, 104 L. Ed. 2d 653 (1989); Byrne v. Butler, 845 F.2d 501, 507 (5th Cir.

1988), cert. denied, 487 U.S. 1242, 108 S. Ct. 2918, 101 L. Ed. 2d 949 (1988).

The district court found Smith's arguments unconvincing on two grounds: first, "[o]nly one aggravating factor was necessary, and it cannot be doubted that the jury would have found the aggravating factor of robbery regardless of the injection of the rape argument by the prosecution"; second, the prosecution was simply "[articulat]ing the implications" apparent at the guilt phase. The state echoes these arguments on appeal. We affirm the district court on slightly different grounds.

The ambit of the punishment phase of a bifurcated capital proceeding is purposefully broader than that of the guilt phase. As the Supreme Court observed in Eddings v. Oklahoma, a just and constitutional capital sentencing

requires that there be taken into account "the circumstances of the offense together with the character and propensities of the offender." 455 U.S. 104, 112, 102 S. Ct. 869, 875, 71 L. Ed. 2d 1 (quoting Pennsylvania v. Ashe, 302 U.S. 51, 55, 58 S. Ct. 59, 60, 82 L. Ed. 2d 43 (1937)). Indeed, the need to account for the circumstances of the crime at sentencing may justify the introduction of otherwise constitutionally violative arguments or evidence. See South Carolina v. Gathers, ___ ___ U.S. ___, 109 S. Ct. 2207, 2211, 104 L. Ed. 2d 876 (1989); Booth v. Maryland, 482 U.S. 496, 507, 107 S. Ct. 2529, 2535, 96 L. Ed. 2d 440 (1987).

Correspondingly, the prosecution's argument to the jury, at any stage encompassing the right to comment on and draw reasonable conclusions from physical

evidence which is before the jury, Cannon v. State, 190 So. 2d 848, 851 (Miss. 1966) (citing cases), and the right to draw inferences from the testimony of witnesses, see Snowden v. State, 356 So. 2d 1143, 1144-45 (Miss. 1978); Ragan v. State, 318 So. 2d 879, 882-83 (Miss. 1975) (citing cases), is given broad latitude at the punishment phase absent argument of some impermissible factor, such as comment on the defendant's failure to testify or the prospect of appellate review insuring the jury verdict. See Cabello v. State, 471 So. 2d at 346; Neal v. State, 451 So. 2d 743, 762 & n. 12 (Miss. 1984); see also Minnick v. State, 551 So. 2d 77, 92-93 (Miss. 1988); Harris v. State, 537 So. 2d 1325, 1329-31 (Miss. 1989); Lanier v. State, 533 So. 2d 473, 483 (Miss. 1988); Woodward v. State, 533 So. 2d 418, 433-34

(Miss. 1988), cert. denied, ___ U.S. ___, 109 S. Ct. 1767, 104 L. Ed. 2d 202 (1989). The Mississippi Supreme Court has cautioned that "[t]he trial judge should not interfere with argument unless counsel clearly and conclusively exceeds the legitimate field of the argument." Gray v. State, 351 So. 2d 1342, 1346 (Miss. 1977), cert. denied, 446 U.S. 988, 100 S. Ct. 2975, 64 L. Ed. 2d 847 (1980). Our standard in reviewing for error of constitutional magnitude must be less exacting still.

Keeping these principles in mind, Smith's argument must be reviewed in the context of the trial as a whole. The district court ably summarized the evidence introduced at trial suggesting that the victim had been raped:

> [T]he evidence of sexual abuse was substantial and apparent to everyone. It is obvious that the motive of this crime was

> not simply robbery. Roberts was alone in a darkened parking lot early on a Sunday morning when she was accosted. She was nevertheless abducted and taken to Smith's apartment. Her sweater and her purse were found on his bed. Her body was found with her pants unbuttoned, her shirt on inside out and her brassiere pulled out of place. Hairs similar to her head and pubic hair were found on Smith's bed. A Negroid pubic hair similar to Smith's was found in her pubic combings. The implications of this evidence were obvious to the jury.

689 F. Supp. at 660.

At sentencing the prosecution initiated its case by presenting the testimony of the forensic pathologist and the serologist; after unsuccessful objection and an effective cross-examination of the serologist by Smith's trial counsel, the state was left with evidence of recent sexual intercourse involving the victim. The sum of its proof, then, amounted to

evidence of an abduction, the likely complete or partial disrobing of her body, including the possible exposure of her breasts and vagina, the likely placement of her nude body on Smith's bed, likely pubic contact between the victim and Smith, and recent sexual intercourse involving the victim. Smith murdered the victim, as the jury concluded at the guilt phase, and there was no suggestion by either side during the guilt or punishment phases that more than one perpetrator had been involved in the victim's abduction and death.[6/] In

---

6/ In McFee v. State, the Mississippi Supreme Court upheld a conviction for rape based in part on a similarly inconclusive typing of pubic hair, explaining that "[it] may well be, as defense counsel argue, that there are many other men whose pubic hairs possess the same characteristics as that found on the victim's body; yet, there is no evidence in the record that any of those others were present in her home on the morning [in question]." 511 So. 2d 130, 134 (Miss. 1987).

closing arguments the prosecution argued that Smith had raped the victim, once, suggesting that "we don't know how many times," but citing the serologist's testimony that numerous sperm cells were present in the victim's vagina.

We cannot conclude that the prosecution's conduct at the punishment phase was sufficiently improper to warrant vacating Smith's sentence under Felde. The suggestion of rape came before the jury during the guilt phase, see Byrne v. Butler, 845 F.2d 501, 511 (5th Cir. 1988), and the subsequent argument to the jury at the punishment phase fell within the latitude afforded closing argument reasonably premised on physical evidence and witness testimony. See, e.g., Mattheson v. King, 751 F.2d 1432, 1445-46 (5th Cir. 1985), cert. dismissed as moot, 475 U.S. 1138, 106 S.

Ct. 1798, 90 L. Ed. 2d 343 (1986); Whittington v. Estelle, 704 F.2d 1418, 1423 (5th Cir.), cert. denied, 464 U.S. 983, 104 S. Ct. 428, 78 L. Ed. 2d 361 (1983); Tijerina v. Estelle, 692 F.2d 3, 7 (5th Cir. 1982). Although the evidence did not reasonably suggest that Smith had been raped more than once, the prosecution only indirectly suggested that the evidence indicated as much, and such an inaccuracy cannot be said to have constituted prosecutorial misconduct. See Jones v. Butler, 864 F.2d at 357-58; Lanier v. State, 533 So. 2d at 483; Cannon v. State, 190 So. 2d at 851.

Given this conclusion, we need not assess the effect of the prosecution's conduct on the outcome of the punishment phase. We note, however, that the pathologist testified without contradiction to the period of suffering

incurred by the victim in dying by manual strangulation, and that the prosecution repeatedly emphasized in its closing arguments at the punishment phase the necessarily intentional and agonizing manner of her death and the means by which her body was disposed. This evidence and argument tended to support the jury's conclusion that the murder was especially heinous, atrocious, or cruel, and thereby buttressed any conclusion it might have reached based on evidence of rape.[7/]

7/ We consider below, in section E, Smith's separate objection to the constitutionality of the "especially heinous" aggravating circumstance.

E. Ineffective Assistance Of Counsel

Smith alleges that he was denied effective assistance of counsel in violation of the sixth amendment, specifically indicating the following errors committed by his trial counsel in his brief before this court: "[l]ack of investigation," "[f]ailure to protect Smith's Fifth Amendment rights," "[l]ack of preparation for expert testimony," "[f]ailure to rehabilitate jurors opposed to the death sentence," "[a]llowing Smith to be dressed in prison garb, rather than regular clothes, throughout trial," "[f]ailure to present mitigating evidence," and "[f]ailure to object or preserve errors for review." Smith does not appear to press other instances that he argued before the district court, including tactical error with regard to the presence of witnesses for the defense

during the identification testimony of Thomas and Wells and failure to prepare adequately for a motion for change of venue, but does contend that the sum of counsel's errors amounts to a violation of his constitutional rights.

In Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984), the Supreme Court described the two components necessary for a convicted defendant to claim that she or he was denied the "reasonably effective assistance of counsel" guaranteed by the sixth amendment:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to

> deprive the defendant of a fair trial, a trial whose result is reliable.

As implied by the above procedure, "[j]udicial scrutiny of counsel's performance must be highly deferential . . . . Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id. at 689, 104 S. Ct. at 2065. Toward that end, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability

sufficient to undermine confidence in the outcome." Id. at 694, 104 S. Ct. at 2068.

Smith makes two arguments that address generally his claim of ineffective assistance. First, he argues that the district court improperly denied an opportunity to conduct discovery or hold a hearing at which Smith's trial counsel could be compelled to testify. Strickland counseled against "second trial[s]" reviewing "counsel's unsuccessful defense," id. at 690, 104 S. Ct. at 2066, and Smith fails to allege conduct that cannot be evaluated on the basis of the record. See Celestine v. Blackburn, 750 F.2d 353, 358 (5th Cir. 1984), cert. denied, 472 U.S. 1022, 105 S. Ct. 3490, 87 L. Ed. 2d 624 (1985); Baldwin v. Maggio, 704 F.2d 1325, 1328-29 (5th Cir. 1983), cert. denied, 467 U.S.

1220, 104 S. Ct. 2669, 81 L. Ed. 2d 374 (1984). Indeed, part of Smith's litany of error is composed of mid-trial confessions of error by his trial counsel. Simply stating an interest in explanations for defense counsel's alleged errors is not sufficient to overcome the trial court's discretion in deciding whether or not to hold a hearing. Daigre v. Maggio, 705 F.2d 786, 787-88 (5th Cir. 1983). To the extent that specific inquiries might be made at such a hearing, the need for a hearing would still be measured by the potential impact of the suggested findings, which we evaluate below in the context of the specific ineffective assistance claims.

Second, Smith appears to suggest that defense counsel's lack of experience in capital cases, his attempt to try the case by himself, and his admitted lack of

resources to investigate the case constituted ineffectiveness per se, citing King v. Strickland, 748 F.2d 1462, 1464 (11th Cir. 1984), cert. denied, 471 U.S. 1016, 105 S. Ct. 2020, 85 L. Ed. 2d 301 (1985), and Kemp v. Ledgett, 635 F.2d 453, 454 (5th Cir. Unit B 1981) (per curiam), as well as secondary materials. Both King and Kemp consider specific allegations of error, as must this court. United States v. Cronic, 466 U.S. 648, 663-67, 104 S. Ct. 2039, 2049-51, 80 L. Ed. 2d 657 (1984) (counsel's preparation time, youth, and dearth of experience in criminal or jury work must be supplemented by indication of specific errors for ineffective assistance claim); Daniels v. Maggio, 669 F.2d 1075, 1082 (5th Cir.), cert. denied, 459 U.S. 968, 103 S. Ct. 295, 74 L. Ed. 2d 278 (1982) (same).

Although no "evidentiary hearing" was conducted by the district court or by the state court on direct or collateral review, this court may be entitled to presume correctness of the state court's determination on Smith's presentation of the ineffective counsel allegations. Smith v. State, 434 So. 2d at 218-20; see Sumner v. Mata, 449 U.S. at 546-47, 101 S. Ct. at 768-69; Buxton v. Lynaugh, 879 F.2d at 142-47; Smith v. Estelle, 711 F.2d 677, 681 (5th Cir. 1983), cert. denied, 466 U.S. 906, 104 S. Ct. 1685, 80 L. Ed. 2d 159 (1984). In reviewing Smith's first petition for a writ of error coram nobis, the Mississippi Supreme Court observed that Smith had failed to comply with the requisite steps for an evidentiary hearing on ineffective counsel and had alleged no facts external to the record, then held:

> [W]e are compelled to conclude that Smith has in effect stipulated that the ineffective assistance of counsel claim which he propounds may be determined strictly from an examination and review of the record itself. This being so, we are likewise compelled to conclude that this issue has been previously adjudicated. In our original opinion in Smith's direct appeal we held: "At the trial the defendant was ably defended by astute counsel retained by his family." Our review of the case at that time (so far as the record shows) pursuant to our statutorily imposed duty of review in a death penalty case convinced us of such able and competent efforts on the part of Smith's defense counsel. In the absence of any specific allegations of fact which do not appear within the trial record itself, Smith's claim of ineffective assistance of counsel has been previously adjudicated and is therefore barred from consideration. Wheat v. Thigpen, supra.

434 So. 2d at 219-20.

The statutory minima for direct review by the Mississippi Supreme Court do not facially require scrutiny of

counsel's performance, and the glancing praise for defense counsel offered on direct review is constitutionally remote from a prior determination on the merits of the claim. In essence, the Mississippi Supreme Court held that because Smith failed to satisfy the requirements for a post-conviction evidentiary hearing on the ineffective assistance claim, and did not allege "new" facts external to the record, he was foreclosed from obtaining any collateral review. There is no indication that Smith presented the ineffective assistance claim during direct review, perhaps in part because one of his counsel on appeal was his trial counsel, and the absence of any trial, direct review, or collateral review of the claim denies the presence of "a full, fair, and adequate hearing in

the State court proceeding." Accordingly, this court will review the record independent of the appraisal of the Mississippi Supreme Court. 28 U.S.C. § 2254(d)(6); see Campbell v. Minnesota, 487 F.2d 1, 4 (8th Cir. 1973), cited with approval in Buxton v. Lynaugh, 879 F.2d at 145-46.[8/] Moreover, since the issue of whether a defendant has received effective assistance of counsel is a mixed question of law and fact, we are free to substitute our judgment for that of the district court. Vela v. Estelle, 708 F.2d 954, 960-61 (5th Cir. 1983),

---

8/ In any event, this court is not bound by the Mississippi Supreme Court's determination that the claim is procedurally barred. Mississippi law recognizes that ineffective assistance claims need not be preserved at trial, Read v. State, 430 So. 2d 832, 836-38 (Miss. 1983), and Smith could not have procedurally defaulted on his claim by failing to raise it on direct review. See supra.

cert. denied, 464 U.S. 1053, 104 S. Ct. 736, 79 L. Ed. 2d 195 (1984).

1. Lack of Investigation

Smith states that his trial counsel "did not investigate the State's experts, did not investigate the facts, and did not prepare a significant mitigation case." Smith suggests that defense counsel did not investigate the state's experts' qualifications or areas of expertise, did not retain experts of his own, prepared only briefly by interviewing the state's experts before their direct testimony, and did not attack the medical testimony in the sentencing hearing. Smith does not suggest deficiencies in the aforesaid qualifications or areas of expertise; on face, the state's experts appear to have been qualified to provide the testimony they did, and the trial judge sharply

rejected defense counsel's attempt to resist the pathologist's qualification as an expert witness, stating that "as far as I know, Dr. Galvez has been the only pathologist that has testified in this court in the three and a half years that I have been hearing cases and it's surprising that anyone doesn't know his qualifications." Moreover, Smith previously contended that he was denied the opportunity to prepare by the lack of notice regarding the identity of the state's experts, a claim deemed procedurally barred by the Mississippi Supreme Court. 434 So. 2d at 218.

At sentencing, the defense did not offer counter-experts, but established doubt as to the conclusiveness of the medical conclusions on cross-examination. Smith specifically alleges that his counsel was ineffective in indicting the

pathologist's conclusion that the victim was killed by manual strangulation, and refers to an expert's affidavit offered to the district court below which concluded that the autopsy report did not definitively exclude other causes of death. Assuming defense counsel should have further impeached the manual strangulation hypothesis, it is unlikely that the error changed the result of either phase, given the relative violence of the rival explanations for the victim's demise and the emphasis on the rape allegation in prosecution of the "especially heinous" aggravating circumstance.

The claim that defense counsel did not "investigate the facts" is belied by numerous instances of sleuthing found in the record. Similarly, the claim that counsel failed to present a significant

mitigation case is contradicted by his performance during the sentencing phase, at which he called five witnesses to testify to Smith's character and plead against imposition of the death penalty. It is not enough to allege a general failure to produce sufficient mitigation; rather, a petitioner must "specify what other mitigating evidence was available or how that evidence could have affected the jury's decision." Sawyer v. Butler, 848 F.2d 582, 592 (5th Cir. 1988), aff'd in part on rehearing en banc, 881 F.2d 1273, 1276 (5th Cir. 1989), aff'd sub nom., Sawyer v. Smith, ___ U.S. ___, ___ S. Ct. ___, ___ L. Ed. 2d ___ (1990); Byrne v. Butler, 845 F.2d at 517. While it is conceivable that some other mitigating evidence might have been presented, it is equally possible that Smith's trial counsel had sound strategic

reasons for not presenting it, and we cannot speculate that Smith was unconstitutionally impaired by any ineffective assistance on such an allegation. See Prejean v. Smith, 889 F.2d 1391, 1398-99 (5th Cir. 1989), cert. denied, ___ U.S. ___, 110 S. Ct. 1836, 108 L. Ed. 2d 964 (1990); McCoy v. Lynaugh, 874 F.2d 954, 964 (5th Cir. 1989); Stringer v. Jackson, 862 F.2d at 1116.

Smith's mitigation argument reduces to the complaint that his trial counsel failed to indicate to the jury Smith's low intelligence. In Jones v. Thigpen, 788 F.2d 1101, 1102-03 (5th Cir. 1986), this court found constitutionally ineffective the failure of counsel to present any mitigation evidence when a habeas hearing in federal district court demonstrated that witnesses for the state

and defense agreed that the petitioner was mentally retarded, with a tested full scale I.Q. of less than 41. Trial counsel for Jones also failed to present proof of the petitioner's youth (seventeen at the time of the crime), and did not present the mitigating circumstance that there was no evidence of intent or indeed of any direct role by the petitioner in the homicide. In the instant case, Smith offered the district court below an undisputed affidavit citing a tested full scale I.Q. of 70, on the upper borderline of mild retardation, and opining that Smith's abilities were inconsistent with the capacity to commit the crime for which he was convicted and inconsistent with the ability to cooperate effectively in his own defense. Although the failure to present any evidence regarding Smith's intelligence

is not obviously the result of strategic choice, compare Bell v. Lynaugh, 828 F.2d 1085, 1088-91 (5th Cir. 1987), cert. denied, 484 U.S. 933, 108 S. Ct. 310, 98 L. Ed. 2d 268 (1987), Smith's circumstances differ from those considered in Jones v. Thigpen and kindred cases. Smith had already testified before the jury,[9/] thereby providing them with an opportunity to form their own opinions regarding his capabilities and capacity, and had a mitigation case presented on his behalf. The jury was presented with eyewitness

---

9/ There is no indication that the petitioner in Jones v. Thigpen testified at trial. See Jones v. Thigpen, 555 F. Supp. 870 (S. D. Miss. 1983), aff'd in part and rev'd in part, 741 F.2d 805 (5th Cir. 1984), vacated, 475 U.S. 1003, 106 S. Ct. 1172, 89 L. Ed. 2d 292 (1986), aff'd on remand, 788 F.2d 1101 (5th Cir. 1986); Jones v. State, 381 So. 2d 983 (Miss.), cert. denied, 449 U.S. 1003, 101 S. Ct. 543, 66 L. Ed. 2d 300 (1980).

testimony,[10/] allegations of rape, and found two aggravating circumstances that are not presented for review by this petition.

The likely impact of testimony regarding Smith's intelligence, moreover, would have been tempered by his trial strategy of insisting on his complete innocence and ignorance of the crime, a theory that also proved the linchpin of the mitigation case offered at the punishment phase and indeed comprised the central argument of each witness for the defense at that phase. There is no suggestion that Smith's alleged deficiencies were such as necessarily to alert defense counsel to the inferiority of such a strategy. Cf. Byrne v. Butler, 845 F.2d at 513. Finally, Smith's

---

10/ Contrast Jones v. Thigpen, 741 F.2d at 807 ("[t]his is a classic case of a felony murder with no eyewitnesses").

alleged deficiencies do not include any significant organic damage or mental illness. Contrast Wilson v. Butler, 813 F.2d 664, 668-73 (5th Cir.), modified on reh'ng, 825 F.2d 879 (5th Cir. 1987), cert. denied, 484 U.S. 1079, 108 S. Ct. 1059, 98 L. Ed. 2d 1021 (1988). Smith's claim neither presents a sufficient deficiency nor consequent prejudice to support a finding of constitutionally ineffective assistance of counsel. See, e.g., Glass v. Blackburn, 791 F.2d 1165, 1170-71 (5th Cir. 1986), cert. denied, 481 U.S. 1042, 107 S. Ct.1985, 95 L. Ed. 2d 824 (1987); Celestine v. Blackburn, 750 F.2d 353, 356-58 (5th Cir. 1984).

2. Failure to Protect Smith's Fifth Amendment Rights

At the suppression hearing challenging certain warrantless searches, Smith was questioned by his counsel for the limited purposes of proving possession of the apartment and lack of consent. On cross-examination the prosecutor questioned Smith about a number of unrelated matters, discussing virtually every major aspect of Smith's account of his activities on the day in question, including his alibi.

Contrary to Smith's argument on appeal, defense counsel objected not once, but five times, to the scope of cross-examination on the motion to suppress, and was upheld three times. The prosecution later used material derived from earlier cross-examination at trial to establish that Smith had said nothing about having marijuana in his

car, to establish some tension between Smith's stated concern that persons might have been in his house and his stated concern for delivering a package to the hospital, to establish that Smith had earlier been able to recall the time he had returned from his party, and to establish confusion over whether he could tell from which direction the shadow he observed had proceeded. In fact, counsel objected at the suppression hearing to questions regarding the package and to questions regarding the shadow, and was sustained on both objections; if anything, his failure was more acute at the later cross-examination, but the effect of the casual impeachment was inconsequential. Smith neither demonstrates a sufficient deficiency nor consequent prejudice sufficient to

independently support an ineffective assistance finding.[11/]

3. Lack of Preparation for Expert Testimony

Smith's claim that defense counsel was ineffective for failing to prepare for expert testimony falls short of establishing constitutional error for the same reasons discussed above in connection with the "lack of investigation" complaint.

4. Failure to rehabilitate jurors opposed to the Death Sentence

Smith briefly notes that his counsel failed to attempt to rehabilitate any potential jurors who were challenged on Witherspoon grounds, Witherspoon v.

11/ United States v. Frappier, 615 F. Supp. 51, 52-53 (D. Mass. 1985), is easily distinguished. There one aspect of counsel's ineffectiveness was his advising the defendant to take the stand at a detention hearing when federal statutory law specifically permitted him to present testimony by proffer at that proceeding.

Illinois, 391 U.S. 510, 521-22, 88 S. Ct. 1770, 1776-77, 20 L. Ed. 2d 776 (1968); see Goodwin v. Balkcom, 684 F.2d 794, 814-17 (11th Cir. 1982), cert. denied, 460 U.S. 1098, 103 S. Ct. 1798, 76 L. Ed. 2d 364 (1983); and cites the opinion of Professor Goodpaster that "[c]ounsel's failure to attempt to qualify death-scrupled jurors constitutes a . . . category of inherently prejudicial ineffectiveness." Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y.U. L. Rev. 299, 351 (1983).

Unlike Goodwin v. Balkcom, each juror excluded for cause had made unmistakably clear that they could not vote for the infliction of the death penalty. As in Goodwin, certain jurors responded to the question of whether they were against the death penalty even under

circumstances when the law and testimony warranted it merely by indicating with a raised hand or other physical gesture their agreement. Neither the form of the question nor the ambiguous means of indicating assent necessarily complies with the strict requisites of Witherspoon. See, e.g., Goodwin, 684 F.2d at 815; Granviel v. Estelle, 655 F.2d 673, 677-78 (5th Cir. 1981), cert. denied, 455 U.S. 1003, 102 S. Ct. 1636, 71 L. Ed. 2d 870, 455 U.S. 1007, 102 S. Ct. 1644, 71 L. Ed. 2d 875 (1982). However, Witherspoon is also satisfied by a jury's unmistakably clear indications "that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt." 391 U.S. at 522 n. 21; 88 S. Ct. at 1777 n. 21 (emphasis in original). Here, the judge directed the following

question to those jurors indicating that they had conscientious scruples against the death penalty:

> Could you nevertheless follow the testimony and the instructions of the court and return a verdict of guilty although that verdict could result in the death penalty if you, being the judges of the weight and the worth of the evidence, were convinced of the guilt of the defendant and the circumstances warranted such a verdict?

Each juror responded clearly and unmistakably. The question and the means of answer satisfy Witherspoon and the issue of counsel's ineffectiveness.

5. Allowing Smith to Be Dressed in Prison Garb Throughout Trial

Smith, again briefly, alleges that defense counsel allowed Smith to "appear at trial in the distinctive blue jumpsuit of a prisoner, rather than regular clothes," and offers as proof counsel's description of Smith as being in a "blue

jumpsuit" during his cross-examination of Wells, one of the eyewitnesses. TR 647-48. Smith's allegation must amount to a claim of ineffectiveness for failing to object to Smith's dress, as Estelle v. Smith is clear that failure to make a contemporaneous objection to the defendant's appearance "is sufficient to negate the presence of compulsion sufficient necessary to establish a constitutional violation." 425 U.S. 501, 513, 96 S. Ct. 1691, 1697, 48 L. Ed. 2d 126 (1976). Assuming the blue jumpsuit was prison garb, counsel's conduct cannot be gainsaid as an inappropriate legal strategy. Although the record is not clear whether Smith wore the jumpsuit on other occasions, it is clear that it was effective for the defense on the occasion cited by Smith as proof: the defense was able to call into question the in-court

identification of Smith by Wells by demonstrating how obvious his choice must have been. Such conduct falls well within the strong presumption of sound trial strategy required by Strickland. 466 U.S. at 689, 104 S. Ct. at 2065.

6. Failure to Present Mitigating Evidence

Smith's claim that defense counsel was ineffective for failing to present mitigating evidence falls short of establishing constitutional error for the same reasons discussed above in connection with his claim of ineffectiveness for failure to prepare a significant mitigation case.

7. Failure to Object or Preserve Errors for Review

Smith claims that defense counsel committed fundamental error by failing to object to "the prosecutor's illegal use of its peremptory challenges to strike

blacks from the jury, the cross-examination of the defendant at the suppression hearing, and the improper and inflammatory closing argument of the prosecutor," and the prosecutor's repeated arguments in closing that the jury should take into account the possibility of parole in determining whether to sentence Smith to death. As previously discussed, counsel did object several times during cross-examination of Smith at the suppression, as did he during the closing argument at the sentencing phase. Smith does not provide any specific complaints regarding important passages to which counsel should have additionally objected, and his claim fails for that reason.

Smith's objection to defense counsel's failure to contemporaneously object to the prosecution's use of

peremptory challenges stutter-steps at the next argument in his appellate brief, in which he attempts to excuse his procedural default of the Batson claim by citing as "cause" the fact that the district attorney's systematic discrimination did not emerge until 1985. This tension is not resolved by the ultimate failure of his procedural default argument, and the ineffective assistance aspect fails for reasons derived from the failure of the Batson claim, discussed below.

Finally, Smith objects to his counsel's failure to object to the prosecutor's repeated references to the possibility of "ten years on parole," but underestimates the complexity of this claim. The prosecutor's remarks were permissible, in part because the defense's closing put into issue Smith's

understanding of his expected prison term, thereby "opening the door" to otherwise impermissible remarks by the prosecutor. Gilliard v. State, 428 So. 2d 576, 583-84, cert. denied, 464 U.S. 867, 104 S. Ct. 40, 78 L. Ed. 2d 179 (Miss. 1983). The defense closing, in turn, was a rational tactic designed to defuse a damaging cross-examination of his client at the sentencing phase, when Smith stated that he had been told he would get out in ten years if given a life sentence, and the scope of cross-examination was itself arguably justified by the direct examination of Smith on his understanding of the alternative sentences open to the jury. Defense counsel's original questions no doubt initiated a chain of events which from Smith's perspective were untoward. However, viewed in the full context of

the sentencing phase, it is difficult to conclude that defense counsel's original error and its legacy were sufficiently ineffective and prejudicial to change the outcome of the proceeding. Addressing a very similar claim in Gilliard v. Scroggy, 847 F.2d 1141, 1147-48 (5th Cir. 1988), cert. denied, U.S. ___, 109 S. Ct. 818, 102 L. Ed. 2d 807 (1989), this court stated:

> We agree that Caldwell v. Mississippi, 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985) directs prosecutors to provide accurate and non-misleading information. We are not persuaded, however, that in this case the prosecutor's information was inaccurate or misleading. The prosecutor said "life is ten years and you are then eligible for parole." This statement, while obviously not a full explanation of Mississippi's system of parole, is an accurate thumbnail statement of the law, absent evidence of two or more prior felony convictions. Miss. Code Ann. § 47-7-3; cf. Miss. Code Ann. § 99-19-81 (Mississippi's

> habitual offender sentencing statute). We cannot conclude that the remarks created an unacceptable risk that the jury would mete out the death penalty arbitrarily or capriciously. Gilliard is not entitled to a new sentencing hearing.

While Smith may be correct in chastising his trial counsel for not objecting on certain occasions and in arguing that Smith was thereby prejudiced, Smith's claims simply fail to establish a possibility that the outcome would be different, either independently or in combination with his other ineffective assistance claims. While it is true that a failure to object properly or to preserve fundamental errors at trial may constitute ineffective assistance, see, e.g., Vela v. Estelle, 708 F.2d at 960-61, the standard under Strickland ultimately diverts attention from legal error to assessing the

probability that the outcome of the proceeding would have been different. Certainly counsel's performance was suboptimal in certain respects, even jarring: he asked the court to grant Smith's wish that counsel's son, not a lawyer, conduct the closing at the sentencing phase, and his own closings in both phases were in large part apologias for his own involvement in the case. Such expressions of reluctance may be constitutionally suspect. King v. Strickland, 748 F.2d 1462, 1464 (11th Cir. 1984), cert. denied, 471 U.S. 1016, 105 S. Ct. 2020, 85 L. Ed. 2d 301 (1985). However, in light of the fact that his individual or sum failings do not appear in reasonable probability to have contributed to a different outcome at the guilt or sentencing phases, his claim of

ineffective assistance of counsel does not warrant relief.

F. Unconstitutionality of Mississippi's "Especially Heinous, Atrocious or Cruel" Aggravating Circumstance

Smith argued in his original appellate brief that his sentence was unconstitutionally imposed because the jury considered the aggravating circumstance of "especially heinous, atrocious or cruel" as one of three aggravating circumstances. Smith's jury was instructed to weigh against them certain specified mitigating circumstances as well as "[a]ny and all other matters, facts and circumstances which you as jurors may consider from the evidence as mitigating," "[a]ny circumstance or combination of circumstances surrounding the defendant's life and character which reasonably mitigates against imposition of the death

penalty," and "[a]ny circumstance or combination of circumstances surrounding the offense which reasonably mitigates against imposition of the death penalty." In returning its sentencing verdict, the jury did not address the presence of mitigating circumstances except to observe that they were outweighed by its finding of all three aggravating circumstances, including the "especially heinous" circumstance.

Smith argued that his sentencing violated Maynard v. Cartwright, 486 U.S. 356, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988), which had invalidated use of an "indistinguishable" Oklahoma statute under Godfrey v. Georgia, 446 U.S. 420, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980). Smith recognized that his argument was in tension with Stringer v. Jackson, 862 F.2d 1108 (5th Cir. 1988), which had

recognized the Mississippi practice of upholding sentences when at least one valid aggravating circumstance remained, but argued that that decision misapprehended Mississippi law. Smith further argued that the removal of an invalid aggravating circumstance had a particularly significant effect when a jury was authorized, as in Mississippi, to weigh aggravating against mitigating circumstances.

The state, in response, recalled the district court's observation that the relevant claims were not "raised at trial or on direct appeal, and they are procedurally barred." 689 F. Supp. at 662-63. The Mississippi Supreme Court had previously on collateral review held the claim barred, seemingly because it was not raised by contemporaneous objection at trial or on direct appeal.

434 So. 2d at 218. (The court's opinion is ambiguous only as to whether it regarded the claim to be barred independently for failure to object at trial.) The state also noted that Stringer and post-Maynard Mississippi cases held that the invalidity of one aggravating circumstance among many was not enough to require reversal of the sentence. In supplemental briefs, Smith argues that Clemons v. Mississippi, ___ U.S. ___, 110 S. Ct. 1441, 108 L. Ed. 2d 725 (1990), forbids automatic affirmance on the basis of at least one valid aggravating circumstance in those states which weigh aggravating against mitigating circumstances, suggesting that this dissolves the only objection on the merits to his Maynard claim. The state has continued to insist that Smith's claim is procedurally barred. Because

the nature of Smith's claims raised the issue of whether his relief relied on "new" rules that could not be applied on collateral review, we requested that the parties file still more supplemental briefs on the issues spawned by Teague v. Lane, ___ U.S. ___, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989).[12/]

12/ After Teague, which sua sponte considered the nonretroactivity issue based on the suggestion of an amicus brief, 109 S. Ct. at 1069, circuit courts have split as to the appropriateness of considering Teague limitations without the issue having been raised by the parties. Compare, e.g., Hill v. McMackin, 893 F.2d 810, 813 (6th Cir. 1989) (deciding application of Teague) with Hanrahan v. Greer, 896 F.2d 241, 245 (7th Cir. 1990). The Fifth Circuit has not explicitly confronted the issue. Given Teague itself and the subsequent sua sponte resolution of Saffle v. Parks, ___ U.S. ___, 110 S. Ct. 1257, 1264 n. 1, 108 L. Ed. 2d 415 (1990) (Brennan, J., dissenting), we believe the better choice is to reach the Teague issue now pressed by the State. Compare Collins v. Youngblood, ___ U.S. ___, ___ S. Ct. ___, ___ L. Ed. 2d ___ (1990) (declining to reach Teague question

(continued...)

1. Priority of the Nonretroactivity Inquiry

The first concern is whether Smith is entitled to the application of the rules described by Maynard and Clemons, given that they might qualify as "new" rules under the nonretroactivity doctrine of Teague v. Lane. Teague declared that a constitutional rule which "breaks new ground," "imposes a new obligation on the States or the Federal Government," or was not "dictated by precedent existing at the time the defendant's conviction became final"[13] would not be applied to

---

12/(...continued)
abjured by counsel for state); Patsy v. Board of Regents of Fla., 457 U.S. 496, 515 n. 19, 102 S. Ct. 2557, 2567 n. 19, 73 L. Ed. 2d 172 (1982) (complying with request of state to pass on potential Eleventh Amendment issue).

13/ Smith's conviction became final on March 21, 1983, when the Supreme Court denied his application for writ of certiorari to review the Mississippi Supreme Court's denial of his direct
(continued...)

cases on collateral review unless the rule falls within at least one of two narrow exceptions. Id. at 1070 (emphasis in original). In further explicating the determination of such rules, Butler v. McKellar suggested a "functional view" of newness in declaring that "'[t]he "new rule" principle therefore validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions.'" Saffle v. Parks, ___ U.S. ___, 110 S. Ct. 1257, 1260, 108 L. Ed. 2d 415 (1990) (quoting Butler v. McKellar, ___ U.S. ___, ___, 110 S. Ct. 1212, 1217, 108 L. Ed. 2d 347 (1990)). In Saffle and earlier in Penry v. Lynaugh, ___ U.S. ___, 109 S. Ct. 2934, 108 L. Ed. 2d 256 (1989), the Supreme

---

13/(...continued)
appeal. 460 U.S. 1047, 103 S. Ct. 1449, 75 L. Ed. 2d 803 (1983).

Court applied Teague's nonretroactivity principle to the collateral review of capital cases presenting eighth amendment challenges to sentencing.

We initially confront the question of the primacy of Teague questions. No case among the Supreme Court quartet has spoken directly to the proper order of consideration when both Teague and procedural default issues are raised: although Teague and each successive case has spoken of nonretroactivity as a "threshold" issue, e.g., 109 S. Ct. at 1069, it is arguable that the "threshold" is relative to the application or statement of the new rule, not to other means of denying relief to the petitioner. The practice of courts considering both Teague and procedural default arguments against a petitioner's claim has been varied, albeit without

explicit acknowledgment of the choice. In Butler v. McKellar, the Court solely considered the Teague issue despite the respondents' contention that the same claim was barred because of a state procedural default. See Brief of Respondents, Butler v. McKellar, ___ U.S. ___, 110 S. Ct. 1212, 108 L. Ed. 2d 347 (1990); Reply Brief for Petitioners, Butler v. McKellar, ___ U.S.___, 110 S. Ct. 1212, 108 L. Ed. 2d 347 (1990). On other occasions courts have considered Teague objections before procedural default issues, United States v. France, 886 F.2d 223, 226-228 (9th Cir. 1989), cert. granted, ___ U.S. ___, 110 S. Ct. 1921, 109 L. Ed. 2d 285 (1990), but have also pursued the opposite tack in identical situations. See United States v. Makaweo, 730 F. Supp. 1016 (D.Hawaii 1990); United States v. Rubio, 722

F. Supp. 77, 82-86 (D. Del. 1989) (alternative holding). In the analogous pairing of Teague and writ abuse issues, the writ abuse issues have thus far been considered first. Collins v. Zant, 892 F.2d 1502, 1510-12 (11th Cir. 1990); Moore v. Zant, 885 F.2d 1497, 1502-03 (11th Cir. 1989) (plurality opinion of en banc court), cert denied, . . . U.S. ___, 110 S. Ct. 3255, 111 L. Ed. 2d 765 (1990); but see Clark v. Dugger, 901 F.2d 908 (11th Cir. 1990) (questioning practice).

The Fifth Circuit has only combined the issues in what are apparently alternative holdings. Hill v. Black, 887 F.2d 513, 518 (5th Cir. 1989), reh'g denied, 891 F.2d 89 (5th Cir. 1989). However, our best reading of the Supreme Court's intimations on the priority of Teague issues leads us to conclude that

the better practice is to engage first in an analysis of the "newness" of Smith's requested rule.

2. Nonretroactivity of the Maynard/Clemons Claim

The Maynard v. Cartwright opinion suggested that the result in that case was dictated by Godfrey v. Georgia, 446 U.S. 420, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980), stating forthrightly that "Godfrey controls this case." 486 U.S. at 363, 108 S. Ct. at 1859. The Court reasoned that the language of the Oklahoma aggravating circumstance at issue -- like that of Mississippi, addressing crimes "especially heinous, atrocious, or cruel" -- "gave no more guidance than the 'outrageously or wantonly vile, horrible or inhuman' language that the jury returned in its verdict in Godfrey." Second, the Court observed, the conclusion of the Oklahoma

court that certain facts "'adequately supported the jury's finding' was indistinguishable from the action of the Georgia court in Godfrey, which failed to cure the unfettered discretion of the jury and to satisfy the commands of the Eighth Amendment." 486 U.S. at 363, 108 S. Ct. at 1859.

The Supreme Court, of course, has cautioned against using the rhetoric of opinions to determine whether they articulate "new" law under Teague, see Butler v. McKellar, ___ U.S. at ___, 110 S. Ct. at 1217, and indeed has suggested that it is not enough to find that prior decisions "inform, or even control or govern, the analysis of [the] claim," unless they can be said to "compel the rule that [the petitioner] seeks." Saffle v. Parks, U.S. at ___, 110 S. Ct. at 1261 (emphasis added). We need not

focus on Smith's eligibility for the application of Maynard, however,[14/] because an essential element to his claim relies on the rule propagated on direct

---

14/ Consequently, we neither agree nor disagree with the conclusion of the Eighth Circuit that Maynard did not represent a new rule for Teague purposes. Newlon v. Armontrout, 885 F.2d 1328, 1333 (8th Cir. 1989), petition for cert. filed, No. 89-1372 (Feb. 13, 1990). It is symptomatic of the difficulty of Teague issues, however, that the Tenth Circuit manifestly regarded its underlying decision in Cartwright v. Maynard, 822 F.2d 1477 (10th Cir. 1987) (en banc) as new. See Coleman v. Saffle, 869 F.2d 1377, 1381 (10th Cir. 1989) ("It cannot reasonably be disputed that our decision in Cartwright was a new and significant development in Oklahoma law"), cert. denied, ___ U.S. ___, 110 S. Ct. 1835, 108 L. Ed. 2d 964 (1990); Cartwright v. Maynard, 822 F.2d at 1482 ("We agree that 'Zant [v. Stephens, 462 U.S. 862, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983)] and Barclay leave open the question of whether a sentencing authority that must weigh all statutory factors may consider constitutionally invalid aggravating circumstances.' Special Project, Capital Punishment in 1984: Abandoning the Pursuit of Fairness and Consistency, 69 Cornell L. Rev. 1129, 1181 (1984).").

appeal in Clemons v. Mississippi. Although Mississippi did not in fact rely on this "one is enough" basis for affirming his sentence, perhaps in part because no claim was presented to that court on direct review, and because it deemed the claim procedurally barred on direct review, we regard constitutional rejection of this practice as a necessary component to Smith's claim on appeal.[15/]

15/ Each of the three Fifth Circuit cases relying on the Mississippi practice as a defense against like claims have also invoked the practice for the first time in federal court. Compare Hill, 891 F.2d at 90 and Stringer, 862 F.2d at 1113-15 and Edwards, 849 F.2d 204, 211 n. 7 (5th Cir. 1988), cert. denied, ___ U.S. ___, 109 S. Ct. 1328, 103 L. Ed. 2d 597 (1989) with In re Hill, 460 So. 2d 792, 800 (Miss. 1984) and Stringer v. State, 485 So. 2d 274, 275 (Miss. 1986) and Edwards v. Thigpen, 433 So. 2d 906, 909 (Miss. 1983). In the district court below the Mississippi practice was invoked as one basis for rejecting a different objection to the sentencing process. 689 F. Supp. at 660.

Clemons rejected the contention that a Mississippi sentence partially predicated on an invalid aggravating circumstance must as a constitutional matter be vacated and remanded to a sentencing jury, but also limited for the first time Mississippi's practice of supporting a death sentence on the basis of a remaining, valid aggravating factor. The Court found that despite recitation of the proper limiting construction of the "especially heinous" aggravating factor, examination of the facts underlying sentencing, and the suggestion that the "'punishment of death is not too great when the aggravating and mitigating circumstances are weighed against each other,'" the Mississippi Supreme Court's reference to its practice

> . . . can be read as a rule authorizing or requiring affirmance of a death sentence so long as there remains at

least one valid aggravating circumstance. If that is what the Mississippi Supreme Court meant, then it was not conducting appellate reweighing as we understand the concept. An automatic rule of affirmance in a weighing State would be invalid under Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978), and Eddings v. Oklahoma, 455 U.S. 104, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982), for it would not give defendants the individualized treatment that would result from actual reweighing of the mix of mitigating and aggravating circumstances. Cf. Barclay v. Florida, 463 U.S. 939, 958, 103 S. Ct. 3418, 3429, 77 L. Ed. 2d 1134 (1983). Additionally, because the Mississippi Supreme Court's opinion is virtually silent with respect to the particulars of the allegedly mitigating evidence presented by Clemons to the jury, we cannot be sure that the court fully heeded our cases emphasizing the importance of the sentencer's consideration of a defendant's mitigating evidence. We must, therefore, vacate the judgment below, and remand for further proceedings, insofar as the judgment below purported to rely on the State Supreme Court's reweighing of aggravating and mitigating circumstances. Cf. Cabana v.

> Bullock, 474 U.S. [376], at 390-392, 106 S. Ct. [689], at 699-700 [88 L. Ed. 2d 704 (1986)].

___ U.S. at ___, 110 S. Ct. at 1450.

Saffle's reading of Lockett and Eddings stressed that "[t]here is a simple and logical difference between rules that govern what factors the jury must be permitted to consider in making its sentencing decision, and rules that govern how the State may guide the jury in considering and weighing those factors in reaching a decision," and noted that rules regarding "how [the jury] must consider the mitigating evidence" were not within the ambit of those cases. ___ U.S. at ___, 110 S. Ct. at 1261; see also Sawyer v. Smith, ___ U.S. ___, ___, ___ S. Ct. ___, L. Ed. 2d ___ (1990) ("general proposition[s]" divined from Lockett and Eddings insufficiently determinative for Teague test), aff'g

Sawyer v. Butler, 881 F.2d 1273 (5th Cir. 1989) (en banc). Mississippi's practice neither addresses what factors the jury may consider, or, in fact, any consideration by the jury at all; the jury in Smith's case, per instance, was free to consider any statutory or nonstatutory mitigating evidence it chose. Mississippi has simply developed a practice as one component of its review process that ignores invalid aggravating circumstances for the sake of valid ones.

Not until Clemons v. Mississippi did the United States Supreme Court specifically apply Godfrey and Maynard to the Mississippi aggravating circumstance, and before that application it could at least be said that the constitutional practice of Mississippi's redemptive status was ambiguous, making reasonable for Teague purposes the rule preceding

Clemons. See Butler, ___ U.S. at ___, 110 S. Ct. at 1217; Saffle, ___ U.S. at ___, 110 S. Ct. at 1260-61. In Evans v. Thigpen, 809 F.2d 239, 241 (5th Cir.) (dicta), cert. denied, 483 U.S. 1033, 107 S. Ct. 3278, 97 L. Ed. 2d 782 (1987), Edwards v. Scroggy, 849 F.2d 204, 211 n. 7 (5th Cir. 1988), cert. denied, 109 S. Ct. 1328, 103 L. Ed. 2d 597 (1989), and most recently in Stringer v. Jackson, 862 F.2d 1108, 1113-15 (5th Cir. 1988), which the Supreme Court has vacated and remanded for consideration in light of Clemons v. Mississippi, see ___ U.S. ___, 110 S. Ct. 1800, 108 L. Ed. 2d 931 (1990), various panels of this court have sustained death sentences premised in part on an invalid aggravating circumstance by recognizing the Mississippi practice of sustaining verdicts when supported by at least one

valid aggravating circumstance. Under this practice, perhaps first represented in Evans v. State, 422 So. 2d 737, 743 (Miss. 1982), cert. denied, 461 U.S. 939, 103 S. Ct. 2111, 77 L. Ed. 2d 314 (1983), the Mississippi Supreme Court typically would recognize the problematic constitutionality of the "especially heinous, atrocious, or cruel" aggravating circumstance, possibly review the sentence for proportionality and under the Coleman limiting construction of the circumstance, and uphold the sentence if in any event the jury had found at least one other valid aggravating circumstance. See, e.g., Pinkney v. State, 538 So. 2d 329, 355-58 (Miss. 1988), vacated and remanded for further consideration in light of Clemons v. Mississippi, 108 U.S. 931, 110 S. Ct. 1800, 108 L. Ed. 2d 931 (1990); Lanier v. State, 533 So. 2d 473,

491 (Miss. 1988) (alternative holding; sentence vacated on other grounds); Lockett v. State, 517 So. 2d 1317, 1336 (Miss. 1987) (alternative holding), cert. denied, 487 U.S. 1210, 108 S. Ct. 2858, 101 L. Ed. 2d 895 (1988); Johnson v. State, 511 So. 2d 1333, 1336-39 (Miss. 1987) (alternative holding), rev'd sub nom., Johnson v. Mississippi, 486 U.S. 578, 108 S. Ct. 1981, 100 L. Ed. 2d 575 (1988); Stringer v. State, 500 So. 2d 928, 944-45 (Miss. 1986); Irving v. State, 498 So. 2d 305, 314 (Miss. 1986) (alternative holding), 481 U.S. 1042, 107 S. Ct. 1986, 95 L. Ed. 2d 826 (1987); Edwards v. State, 441 So. 2d 84, 92 (Miss. 1983) (alternative holding; sentence vacated on divided opinion); Tokman v. State, 435 So. 2d 664, 670 (Miss. 1983) (alternative holding), cert.

denied, 467 U.S. 1256, 104 S. Ct. 3547, 82 L. Ed. 2d 850 (1984).

This practice relied in part on decisions of the Supreme Court subsequent to Lockett and Eddings (and subsequent by a matter of months to the point at which Smith's conviction became final) that might with hindsight be read as anticipating Clemons, but at the time might have appeared to confirm the constitutionality of the Mississippi practice. Zant v. Stephens, 462 U.S. 862, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983), upheld a death sentence administered under the Georgia sentencing scheme when one of three aggravating circumstances found by the jury was subsequently held invalid by the Georgia Supreme Court while the other two aggravating circumstances were specifically upheld. Although the

opinion recognized the potential differences attending a "weighing" state, id. at 873 n. 12, 890-91, 103 S. Ct. at 2741 n. 12, 2750, the chief import of the decision was often viewed as confirming the constitutional latitude afforded the common state practice of redeeming death sentences when more than one aggravating circumstance was present, and Zant was relied upon by this court and the Mississippi Supreme Court in warranting the Mississippi practice. See, e.g., Stringer v. Jackson, 862 F.2d at 1113-14; Lanier v. State, 533 So. 2d at 491; Lockett v. State, 517 So. 2d at 1336; Johnson v. State, 511 So. 2d at 1336-39; Stringer v. State, 500 So. 2d at 944-45; Irving v. State, 498 So. 2d at 314.[16/]

16/ Butler's observation regarding the retroactivity of judicial rhetoric is surely appropriate to any effort to locate the distinctions of Clemons in

(continued...)

Similarly, while the plurality opinion in Barclay v. Florida, 463 U.S. 939, 103 S. Ct. 3418, 77 L. Ed. 2d 1134 (1983), might have suggested a reservation regarding certain circumstances in "weighing" states, see id. at 954 n. 12, 103 S. Ct. at 3427 n. 12, the opinion also noted that Florida, like Georgia, "requires the sentencer to find at least one valid aggravating circumstance before the death penalty may even be considered," id. at 954, 103 S. Ct. at 3427, and ultimately upheld the Florida scheme. Finally, Maynard v. Cartwright left to Oklahoma the redetermination of sentence and

---

16/(...continued)
Zant. In Johnson v. Mississippi, for example, the Court stressed its "specific[] reli[ance]" in that case on the admissibility of evidence at the sentencing hearing, 486 U.S. 578, 590, n. 9, 108 S. Ct. 1981, 1989 n. 9, 100 L. Ed. 2d 575 (1988), a characterization of Zant that by itself might well warrant affirming Smith's sentence.

recognized the possibility that the court "would not necessarily set aside a death penalty where on appeal one of several aggravating circumstances has been found invalid or unsupported by the evidence." 486 U.S. at 365, 108 S. Ct. at 1860.

To the extent that these cases contain reservations distinguishing schemes like that administered by Mississippi, it cannot be said that such distinctions represented legal determinations that control the outcome of Smith's case, and certainly not so for the law applicable at the time his conviction became final. The Supreme Court explicitly acknowledged at a time prior to that date that it would not distinguish between functionally similar sentencing schemes, even if the differences would obviate the potential distinctions marking a "weighing" state.

See Franklin v. Lynaugh, 487 U.S. 164, 108 S. Ct. 2320, 2331 n. 12, 101 L. Ed. 2d 155 (1988) (citing Adams v. Texas, 448 U.S. 38, 46, 100 S. Ct. 2521, 2526, 65 L. Ed. 2d 581 (1980)); see also Stringer v. Jackson, 862 F.2d at 1115 (opining that there is "no difference, other than one in semantics, between instructing a jury to weigh aggravating against mitigating circumstances in determining the sentence and instructing a jury to consider all aggravating and mitigating circumstances in deciding on the sentence"). Of the large number of cases which have enforced a practice such as that of Mississippi, the majority have ignored fine distinctions among the various states' capital schemes. See e.g., Lindsey v. Thigpen, 875 F.2d 1509, 1515 (11th Cir. 1989) (applying Alabama law); Coleman v. Saffle, 869 F.2d at 1390 (applying

Oklahoma law); Mercer v. Armontrout, 844 F.2d 582, 584-85 (8th Cir. 1988) (applying Missouri law), cert. denied, ___ U.S. ___, 109 S. Ct. 249, 102 L. Ed. 2d 238 (1988); Neuschafer v. Whitley, 816 F.2d 1390, 1393 (9th Cir. 1987) (applying Nevada law); Baldwin v. State, 456 So. 2d 117, 126-28 (Ala. Crim. App. 1983), aff'd, Ex parte Baldwin, 456 So. 2d 129 (1984), aff'd, Baldwin v. Alabama, 472 U.S. 372, 105 S. Ct. 2727, 86 L. Ed. 2d 300 (1985); People v. Bittaker, 48 Cal. 3d 1046, 49 Cal. 3d 501B, 259 Cal. Rptr. 630, 662, 774 P. 2d 659, 691, cert. denied, ___ U.S. ___, 110 S. Ct. 2632, 110 L. Ed. 2d 651 (1989); State v. Johns, 679 S. W. 2d 253, 267 (Mo. 1984), cert. denied, 470 U.S. 1034, 105 S. Ct. 1413, 84 L. Ed. 2d 796 (1985); State v. Mercer, 618 S. W. 2d 1, 10 & n. 5 (Mo.) (dicta), cert. denied, 454 U.S. 33, 102 S. Ct.

432, 70 L. Ed. 2d 240 (1981); State v. Jones, 288 S. C. 1, 340 S. E. 2d 782, 784 (1985); Stout v. Commonwealth, 237 Va. 126, 376 S. E. 2d 288, 292 (1989), cert. denied, ___ U.S. ___, 109 S. Ct. 3263, 106 L. Ed. 2d 609 (1989).

Rather than allowing the federal judiciary a means of reneging on its commitment to the proposition that there is no "one right way for a State to set up its capital sentencing scheme," Spaziano v. Florida, 468 U.S. 447, 464, 104 S. Ct. 3154, 3164, 82 L. Ed. 2d 340 (1984), the Teague doctrine in part tolerates the diversity of state schemes by accepting the fact that various jurisdictions will not always correctly anticipate the ultimate constitutional significance of every detail. Instead, "reasonable, good-faith interpretations of existing precedents" are sufficient to

prevent the application of new law. Butler, 110 S. Ct. at 1217; see also Sawyer v. Smith, ___ U.S. at ___, ___ S. Ct. at ___ (incorrect characterization of Supreme Court precedent by Mississippi Supreme Court further indicates extent to which subsequent constitutional ruling was not dictated). We hold, consequently, that the application of Clemons to Smith would involve the application of a "new rule" on collateral review, a practice normally barred by Teague.

3. Exceptions to the Teague Rule

The general principle that new rules will not be applied to cases on collateral review enjoys two narrow exceptions, but Smith's requested rule is entitled to neither. First, a rule may be applied retroactively if the rule places certain kinds of primary, private

individual conduct beyond the power of the state to proscribe, see Teague, ___ U.S. at ___, 109 S. Ct. at 1075, or concerns a "substantive categorical guarante[e] accorded by the Constitution," such as a rule "prohibiting a certain category of punishment for a class of defendants because of their status or offense." Penry, ____ U.S. at ___, 109 S. Ct. at 2953. Because "[t]he rule sought by [Smith] would neither decriminalize a class of conduct nor prohibit the imposition of capital punishment on a particular class of persons," he does not qualify for this exception. Saffle, ___ U.S. at ___ 110 S. Ct. at 1263.

The second exception is for those rare "watershed rules of criminal procedure" which implicate the fundamental fairness and accuracy of the

criminal proceeding. See Saffle, ___ U.S. at ___, 110 S. Ct. at 1263; Butler, 110 S. Ct. at 1218. As the en banc court noted in Sawyer v. Butler, 881 F.2d 1273, 1294 (5th Cir. 1989) (en banc), aff'd, sub nom. Sawyer v. Smith, ___ U.S. ___, ___ S. Ct. ___, ___ L. Ed. 2d ___ (1990), this exception is tailored to those rules designed to redress constitutional violations which "so distort the judicial process as to leave one with the impression that there has been no judicial determination at all, or else skew the actual evidence crucial to the trier of fact's disposition of the case," and does not include procedurally flawed contemplation or review of relevant evidence. As the Supreme Court recently observed in Sawyer v. Smith, "[a]ll of our Eighth Amendment jurisprudence concerning capital sentencing is directed

toward the enhancement of reliability and accuracy in some sense," but Teague's second exception is limited to "watershed" rules affecting "bedrock procedural elements." ___ U.S. at ___, ___ S. Ct. at ___. The rule on which Smith would rely is not of such exalted stature.

Because we conclude that a necessary component of Smith's claim that the use of the "especially heinous" aggravating circumstances in his sentencing phase was barred by Teague, we do not consider whether that claim has been procedurally barred or has merit.

G. Discriminatory Use of Peremptory Challenges

In the words of his habeas petition to federal district court, Smith contends that his

> [D]eath is being exacted pursuant to a pattern and practice of Mississippi

> prosecuting authorities, courts, juries and governors to discriminate on grounds of race, sex and poverty in the administration of capital punishment. For this reason, the imposition and execution of Petitioner's death sentence under Mississippi law and practice violates the eighth amendment and the equal protection and due process clauses of the fourteenth amendment to the Constitution of the United States.

The Mississippi Supreme Court held a substantially identical claim to be barred for failure to raise the claim at trial or on direct appeal, 500 So. 2d at 974-76, and the federal district court agreed. 689 F. Supp. at 662-63.

Smith seeks to provide "cause" for his default by claiming he lacked the information regarding the practices of the particular prosecution office presented to the district court in Edwards v. Thigpen, 682 F. Supp. 1374 (S. D. Miss. 1987), aff'd sub nom., Edwards

v. Scroggy, 849 F.2d 204 (5th Cir. 1988), cert. denied, ___ U.S. ___, 109 S. Ct. 1328, 103 L. Ed. 2d 597 (1989). However, the proof offered in that case was found to fall short of establishing a prima facie case, 849 F.2d at 208-09, and Smith does not allege additional facts warranting a different outcome in his case.[17/] We agree with the courts below that Smith has procedurally defaulted on his claim. See, e.g., Thomas v. Moore, 866 F.2d 803 (5th Cir.) (failure to timely object to the jury selection process voids relief), cert. denied, ___ U.S. ___, 110 S. Ct. 124, 107 L. Ed. 2d 85 (1989). Moreover, because Smith's conviction became final before Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712,

---

17/ The state contends without contradiction that while petitioner Edwards had no blacks on his jury, Smith had three.

90 L. Ed. 2d 69 (1986) (per curiam), was decided, he is not in any event entitled to rely on its rule. Allen v. Hardy, 478 U.S. 255, 258-61, 106 S. Ct. 2878, 2879-81, 92 L. Ed. 2d 199 (1986).

H. Validity of Mississippi's Procedural Bars

Smith contends generally that "[n]either the contemporary objection rule nor the rule on assertion of claims on appeal has been consistently applied by Mississippi in capital cases," and that procedural default rules do not therefore preclude federal courts from reaching the merits of his claims. See, e.g., Johnson v. Mississippi, 486 U.S. 578, 108 S. Ct. 1981, 100 L. Ed. 2d 575 (1988). As discussed previously, Smith is entitled to proceed on claims appropriately reserved by contemporaneous objection, notwithstanding the Mississippi rule. However, his clemency

does not extend to claims raised neither at trial nor on direct appeal. See Johnson v. Thigpen, 623 F. Supp. 1121, 1127-28 (S. D. Miss. 1985), aff'd, 806 F.2d 1243 (5th Cir. 1986), cert. denied, 480 U.S. 951, 107 S. Ct. 1618, 94 L. Ed. 2d 802 (1987). Smith's contention that the contemporaneous objection rule should also be ignored was recently, and for the purposes of this appeal, decisively rejected in Hill v. Black, 887 F.2d 513, 516-17 (5th Cir. 1989).[18/]

18/ Because we decide that Smith's claim that the "especially heinous" aggravating circumstance is unconstitutional to be precluded by Teague, see supra, section E, we do not separately consider his potentially distinct argument that Mississippi has not regularly enforced its procedural bars with regard to such claims.

I. Denial of an Evidentiary Hearing and Critical Discovery

Smith argues that the district court erred in denying his "request for an evidentiary hearing and for pre-hearing discovery, including scientific testing of physical evidence and compulsory process to depose Gregg [Smith's trial counsel]." To the extent that this argument bears on the rape allegation and the ineffective assistance of counsel claim, it has already been discussed, and is without merit. Smith newly argues for DNA testing of the hair and/or semen in evidence, but does not provide a reasoned argument for overturning the district court's discretion in pursuit of what amounts to a new trial. Cf. Daigre v. Maggio, 705 F.2d at 787-88.

III.

For the reasons stated above, we AFFIRM the judgment of the district court denying Smith's petition for a writ of habeas corpus.

AFFIRMED.

APPENDIX B

WILLIE ALBERT SMITH,
Petitioner-Appellant,

v.

LEE ROY BLACK, Commissioner,
Mississippi Department
of Corrections, et al.,
Respondents-Appellees

No. 88-4790

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

August 24, 1990

Appeal from the United States District Court for the Southern District of Mississippi.

Politz, King, and Smith, Circuit Judges.

PER CURIAM

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35), the Suggestion for Rehearing En Banc is DENIED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

WILLIE ALBERT SMITH — PETITIONER

VS. — CIVIL ACTION NO. J83-0573(B)

MORRIS THIGPEN, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS; EDDIE LUCAS, WARDEN, MISSISSIPPI STATE PENITENTIARY, ET AL. — RESPONDENTS

MEMORANDUM OPINION AND ORDER

Willie Albert Smith brings this Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254, attacking the judgment of conviction and death sentence entered against him on July 30, 1981, in the Circuit Court of the First Judicial Circuit of Hinds County, Mississippi. For the reasons set out below, the Petition is denied.

Smith was convicted of the murder of Shirley Roberts during the course of a robbery in violation of Miss. Code Ann. § 97-3-19(2)(e). Roberts was abducted on the morning of March 15, 1981, from the parking lot of the convenience store where she worked. Smith was arrested near the store about an hour later, driving a car like the one in which Roberts' assailant had been seen. One of Roberts' shoes was found in the car, and her body was found behind Smith's nearby apartment.

The evidence against Smith in this case is overwhelming. Neither at the trial, nor at post-conviction proceedings in state court, nor in this petition has any evidence been put forward which exculpates him. At trial Smith relied for his defense on the insufficiency of the state's evidence and on his own

rambling, incoherent and totally implausible alibi.

In this Petition, Smith raises the following principal claims:

A. The state used perjured testimony.

B. The state withheld exculpatory evidence.

C. The state used improper argument at the sentencing portion of the trial by referring to (1) rape and (2) parole.

D. The state excluded Blacks from the jury.

E. His trial counsel was ineffective.

F. The Mississippi death penalty statute is unconstitutional as applied to him.

These principal claims are addressed in separate sections below. In addition to them, Smith's Petition includes numerous other claims for which Smith has not provided legal support in his memorandum of law and which are too ill-defined to

summarize here. The state responded to all of those claims by raising the jurisdictional bar of Miss. Code Ann. § 99-39-21 because the claims were not raised at trial or on direct appeal. Smith has not demonstrated cause to excuse his procedural default on those claims. The Court therefore finds the claims barred and will not consider them further.

The most substantial claim Smith raises regards the use of perjury by the state. Smith argues that his conviction rests on the in-court identification made by the two witnesses to the abduction and that the state knew those identifications to be perjured. These allegations were fully examined at a post-conviction evidentiary hearing in the Hinds County Circuit Court.

Smith attempts to characterize the state's case against him as dependent entirely on the allegedly perjured testimony. That testimony was, however, only a small part of the case. The bulk of the proof was presented through the testimony of police officers, forensic experts and other witnesses without reliance on the testimony of the eyewitnesses. To place the perjury claim in perspective, the Court presents below a detailed account of the story told by the evidence without reliance on the eyewitness testimony.

THE CRIME

Shirley Roberts was the manager of Tote-Sum Store No. 6 on Robinson Street in Jackson, Mississippi. She was scheduled to open the store for business at 6:00 o'clock on Sunday morning, March 15, 1981.

Sgt. G. E. Oatis, Supervisor of the night shift of Precinct 2 of the Jackson Police Department, was on duty that morning. About 5:30 Sgt. Oatis stopped at the closed Tote-Sum Store to use the public telephone in the parking lot. Roberts' car was in the lot.

Two young men, Kenneth Thomas and James Wells, drove up while Oatis was there. Thomas got out of the car, approached Oatis and asked if there had been a robbery. Oatis asked what he meant, and Thomas explained that as he and Wells had passed the Tote-Sum Store a few minutes earlier, they had seen a black man forcing a white woman into a red Pinto. Oatis noticed that the chain used to secure the door of the store was lying on the pavement in front of the door although the door itself remained locked. Nearby lay a $20 bill, a set of

car keys, and a silver-colored pair of brass knuckles. On the parking lot next to Oatis' patrol car lay a woman's tennis shoe and a pair of eye-glasses with a silver neck chain.

Oatis immediately radioed an alarm. It was 5:40 A.M. The police quickly learned that the car in the lot belonged to Roberts and that she was the manager scheduled to open the store that morning. While other police units responded to search the area for the red Pinto and the missing woman, Sgt. Oatis remained at the Tote-Sum Store, protecting the evidence for the mobile crime lab and awaiting a key to the door.

Shortly after 6:00, Willie Albert Smith was driving a red Pinto on Robinson Street toward Tote-Sum Store No. 6. As he neared the store, he noticed the police cars parked there, made a u-turn

in the street and began to drive the other way. Smith testified that he thought the police were checking for drivers licenses and that he turned around because his license was at home and expired and because he had a bag of marijuana in the car.

From the Tote-Sum parking lot, Sgt. Oatis spotted Smith's red Pinto as it approached. Seeing the Pinto make a u-turn and head the other way, Oatis concluded that the driver had turned to avoid him. He pursued and stopped Smith. As he overtook the Pinto, Sgt. Oatis saw Smith lean over to reach under the right-hand seat of the car. Suspecting that Smith had hidden a weapon, Oatis checked under the seat when he stopped the car. He found a woman's tennis shoe. The shoe was an exact mate to the tennis

shoe in the parking lot. Oatis placed Smith under arrest.

Smith denied knowing anything about the missing woman, and refused to talk about the shoe. Smith admitted, however, that he had borrowed the car from its owner, Charles McDonald, earlier that morning, and he agreed to lead the police officers to McDonald's house nearby. Smith was handcuffed and placed in Oatis' patrol car. One of Smith's hands was stained with blood.

Charles McDonald's mother admitted the police officers to her house and led them to her son's room. McDonald was in a deep sleep. After the officers waked him, McDonald explained that he had been at a party with Smith the night before, but had returned home and gone to bed at 4:30. Smith had ridden home with him and had asked to borrow the Pinto. McDonald

stated that Smith left with the Pinto at 4:30. McDonald let Sgt. Oatis examine the clothes he had been wearing the night before. Sgt. Oatis examined them for tears or stains, but found nothing suspicious. McDonald's family members confirmed that McDonald had come home and gone to sleep when he said and that the clothes he showed Sgt. Oatis were the ones he had worn the night before. McDonald agreed to lead the police to Smith's house.

Smith lived in a small duplex apartment house about five minutes from Tote-Sum Store No. 6. The building had a small, enclosed porch. The front door of the building was missing; the interior hall was open to the street. The two apartments opened off of the hall. Smith's apartment was unlocked. Fearing for Roberts' safety, the officers

immediately entered the apartment. They found Roberts' brown purse and a woman's white sweater lying on Smith's bed. On the floor by the bed they found a padlock with a set of keys, one of which was in the lock, a pair of dress shoes caked with fresh mud, and a pair of khaki pants wiped with mud. The pants were stained with blood. Mud and leaves were on the floor by the back door and in the kitchen.

Just behind the house was an area of heavy, wet mud and a broken down fence. Beyond the fence were woods. About 15 feet behind the house, at a point at which the fence had been trampled down into the mud, Officer Jerry Grice found the beginning of a trail which appeared to have been made by something being dragged. The drag trail began inside the fence and continued on the wooded side

through the mud and into the heavy leaves which covered the floor of the woods. Officer Grice followed the drag trail 40 or 50 yards into the woods downhill to a small drainage ditch. Leaves and sticks had been piled in the water, but a human ankle was visible through the leaves. Shirley Roberts' body lay face down in the water under the leaves and sticks. The time was 7:12 A.M. Little more than an hour and a half had passed since Sgt. Oatis had radioed the first alarm.

At trial, Dr. Rodrigo Galvez, the forensic pathologist who performed the autopsy, testified that Roberts had been strangled to death before being placed in the water. Her body bore numerous scratches, abrasions, and bruises, and on the left side of the head were two wounds which had been made by blows from a blunt instrument.

Charles McDonald, the owner of the Pinto, testified that the evening before the crime Smith had shown him a pair of brass knuckles which resembled the silver-colored pair found at the scene and introduced into evidence. McDonald said that Smith had shown him the brass knuckles before they left for the party and that Smith acted as though he had them at the party:

> A. It was the early part of the night. You know, he patted his pocket and said he had them but he didn't pull them out.
>
> . . . . . .
>
> A. You know, it was a man came in, you know, and he said: "That man don't like me" and just patted his pocket and said: "Don't worry about it."

(Trial Record at 860-61, 862).

McDonald also testified that he did not see Smith with any money that night. At the time of his arrest, however, Smith had a one hundred dollar bill in the pocket of his pants. Another hundred

Napue v. Illinois, 360 U.S. 264, 271 (1959)). See also Agurs, 427 U.S. at 103.

The constitutional standard of review for cases of knowing use of perjured testimony by the state is much stricter than the traditional standard of review for recanted testimony. Under the latter even if perjury is proved the verdict should stand unless "a new trial will probably result in acquittal." Adi, 759 F.2d at 407. Under the former, however, even if acquittal is unlikely, a new trial is required "if the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury. . . ." Giglio, 405 U.S. at 154. Smith argues that his trial must be reviewed under the strict, constitutional standard. He argues that eyewitness identifications have such a

constitutional review. See Mooney v. Holohan, 294 U.S. 103.

Allegations of prosecutorial misconduct contributing to perjury, on the other hand, set out a constitutional claim, and if proved invoke a much stricter standard of review than that applied to newly discovered evidence. See United States v. Agurs, 427 U.S. 97, 111 (1976). The strictest standard of review is reserved for cases in which the state has knowingly used perjured testimony because such conduct is "a corruption of the truth-seeking function of the trial process." Agurs, 427 U.S. at 104 (interpreting Mooney and related cases). A new trial is required if "the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury. . . ." Giglio v. United States, 405 U.S. at 154 (citing

is treated as new evidence, properly the subject of a motion for new trial. The trial judge is vested with considerable discretion to evaluate both the truth of the testimony and the effect of any perjury on the verdict, and the defendant must carry a heavy burden of proof:

> In this Circuit, a defendant who challenges the trial court's denial of the motion has the burden of showing that: (1) the evidence was discovered following trial, (2) the failure to learn of the evidence was due to no lack of due diligence on the part of the defendant, (3) the evidence is not merely cumulative or impeaching, (4) the evidence is material, and (5) the evidence is such that a new trial will probably produce an acquittal.

Adi, 759 F.2d at 407 (discussing the recanted testimony of a government witness). Recanted testimony does not by itself set out a claim of deprivation of the federal right to due process and therefore is not ordinarily cause for

Amendment. Mooney v. Holohan, 294 U.S. 103 (1935). Relying upon Giglio v. United States, 405 U.S. 150 (1972), which held that the government must insure the accurate disclosure of any promises made by the government in return for the testimony of a witness, Smith argues that the merely negligent use of perjury by the state is the equivalent of the knowing use condemned in Mooney. The Court rejects Smith's interpretation of Giglio for the reasons set out below.

Thomas and Wells are recanting witnesses. Traditionally, recanting witnesses are viewed with extreme suspicion in both state and federal court. United States v. Adi, 759 F.2d 404, 407-8 (5th Cir. 1985); United States v. Kearney, 682 F.2d 214, 219 (D.C. Cir. 1982); Smith v. State, 492 So. 2d 260, 263-65 (Miss. 1986). Recanted testimony

due process under the Fourteenth
obtain a conviction is a deprivation of
use by a state of perjured testimony to
It is well established that the knowing
the United States." 28 U.S.C. § 2254(a).
"the Constitution or laws or treaties of
trial rendered the verdict invalid under
prove that the presence of perjury at his
based on his perjury claim, Smith must
To obtain a writ of habeas corpus

1. Standard for Federal Review

from Thomas and Wells.
recanting statements which he obtained
fact, Smith relies principally on
perjured. To support his allegations of
to recognize that the testimony was
state either knew or negligently failed
allow it to go uncorrected because the
to solicit the perjured testimony or to
asserts that it was wrong for the state
testimony on other matters. Smith

The foregoing account does not rely on any of the testimony of the two eyewitnesses, Kenneth Thomas and James Wells. Their testimony was not necessary to prove the case against Smith. The evidence was overwhelming without it. Kenneth Thomas and James Wells were, nevertheless, valuable witnesses. They were able to describe the assault on Roberts in detail, and they reported the red Pinto to Sgt. Oatis. The truth of their testimony on those matters is proved beyond question and has not been challenged.

A. THE PERJURY CLAIM

Smith alleges that the eyewitnesses, Thomas and Wells, lied at trial when they identified him as Roberts' assailant and when they testified to certain details of the assailant's red Pinto. Smith does not challenge the veracity of their

blood on his khaki pants when he left them on the porch. He stated that the one hundred dollar bill in his pocket belonged to him and that he had been saving the money to buy a car. Smith admitted that he owned a pair of brass knuckles, but he stated that his were black, not silver like those found at the Tote-Sum Store. He denied that he had taken the brass knuckles to the party, explaining that he left them at his apartment on the head of his bed. He denied that anyone had taken a swabbing of a stain on his hand. He stated that the keys to the Pinto were in his pants pocket when he passed out on the porch.

Smith's alibi was implausible and contrived. His testimony was hurried and incoherent. The trial judge reported that Smith was belligerent, hostile and easily provoked. (T.R. 1630).

ran to his sister's house next door and knocked so he could use the phone. No one came to the door. He then found a piece of cloth, tied the fallen muffler back up under the Pinto and left driving toward town to do to work. At that point he saw the police cars at the Tote-Sum Store and turned around to avoid them. As he turned around he dropped the cigarette he was smoking, and it fell over onto the floor board on the right-hand side of the car. He was leaning over to pick up the cigarette when Sgt. Oatis stopped him. Sgt. Oatis walked up holding a shoe behind his back, pulled Smith out of the car and placed the shoe in the car. Another officer arrived, saw the shoe and accused Smith of abducting the woman.

Smith went on to explain that there was no mud on his dress shoes and no

around the side of his house. He got up, someone with an afro hair style going suddenly later and was startled by the porch for some time. He woke drugged his drink. He lay passed out on porch, because someone at the party had passed out, falling backwards across the then turned to leave, but suddenly he next to the door of his apartment. He these with the dress shoes in the hall party, including khaki pants, and placed folded the clothes he had worn to the and changed clothes there. He neatly the line. He returned to the front porch his backyard and got some clothes from into his apartment. Instead he went to someone was inside, he decided not to do door, but no one responded. Afraid that taken his key. Smith knocked on the his last girlfriend had moved out and not been able to lock his apartment since

apartment a few days before. Smith had someone had tried to get into his was in his apartment, because he believed immediately became afraid that a prowler to hear his radio playing. He was surprised to see lights on inside and home, but when he got to his apartment he explained his subsequent actions as follows: From McDonald's house he went car about 4:30 that morning. Smith He agreed that he had borrowed McDonald's which the police found in his apartment. had worn the khaki pants and dress shoes before the crime and that at the party he the party with Charles McDonald the night alibi. He admitted that he had been at the defense, presented an elaborate Smith, as the only witness called by was similar to hairs taken from Smith. That hair when examined microscopically Roberts contained one negroid public hair.

could have come from Roberts and could not have come from Smith. She explained that the characteristics identified in Roberts' blood and in the blood on the khaki pants could be expected to occur together in the blood of less than 0.3% of the general population.

Joe Andrews, a forensic scientist specializing in hair and fiber identification with the Mississippi Crime Lab, testified to his analysis of hair samples taken from Smith's bedroom and from public combings taken from Roberts' body. He testified that several hairs removed from Smith's bed covers were similar to hairs from Roberts' head. The hairs were similar in diameter and were both dyed the same color. Several public hairs removed from the bed and the sweater were caucasian and matched Roberts'. The public combings taken from

identified as her mother's the purse, sweater and tennis shoes.

Edwina Ard, forensic serologist for the Jackson Police Department, testified to the results of blood tests on the stain on Smith's hands and on the khaki pants which Smith had worn to the party. She testified that the swabbings of Smith's hand tested positive for human blood, but the blood was of an insufficient quantity to be typed. Ard stated that she had been able, however, to type the blood found on the khaki pants. She analyzed the blood for four sub-types and compared the results to the analysis of known blood samples from Shirley Roberts and from Smith. The results corresponded exactly to the results obtained for Roberts' blood and were distinctly different from Smith's. She concluded that the blood on the pants

(T.R. 1035-36).

Renea Roberts had also seen the money in her mother's purse the day before the crime:

A. Friday before March 13th I borrowed some money for her and then Saturday morning I got my income check and I cashed it and I was bragging about how much money I had and then she said: "Well, I am rich too. I've got about $300 and something dollars in my purse" and, when I got it cashed I went shopping and then that night before I went to work I put the -- I borrowed $5.00 from her and I put the money back in her purse and I noticed that there was at least one folded one-hundred dollar bill but there was some others folded underneath it and there were some 20's not folded in a bank envelope.

Q. So there was more than one $100 bill? Is that right?

A. Right.

(T.R. 1040-41).

Wilson also identified the keys found in Smith's apartment as the store keys issued to Roberts. Renea Roberts

dollar bill was found in the pocket of the khaki pants which were found in Smith's bedroom and which Smith admitted that he had worn to the party.

Jesse Wilson, who was Roberts' supervisor at the Tote-Sum Store, and Roberts' daughter Renea testified that Roberts had at least two one hundred dollar bills in her purse the weekend of the crime. Wilson explained how he knew:

Q. How much money did she have Saturday morning when you saw her?

A. She had -- I know I saw at least one $100 bill plus some other bills in her wallet and if you want to know the reason I saw it, we let employees sign tickets for merchandise that they want in the store and we normally hold it out of their pay checks and I was going to enter it on the reports so it could be held out of her paycheck and she said she would pay it and she dropped her billfold and I was picking at her about the money she had in her pocket -- you know in her purse.

necessary. Thomas was urged by his family not to get involved in the trial.

At the trial, both Thomas and Wells were cross-examined at length about the sincerity of their identification of Smith in light of their prior inconsistent statements, and about whether they were pressured by the prosecution to make the identification. Thomas and Wells did not simply deny that they had been influenced. Each explained in very plausible detail why he was able to identify Smith at the trial even though he had never done so before and even though he had told the police and the defense that he could not do so.

Thomas admitted on cross-examination that he had not identified Smith in the police lineup. Thomas insisted, however, that he recognized Smith in the lineup

feel that his presence at trial was
he felt was necessary, and he did not
Thomas was willing to help only so far as
Wells never wanted to be involved at all.
only because they had been subpoenaed.
unwilling witnesses at trial, appearing
testimony. On the contrary, they were
received no deals in return for their
implicated in the crime. They had
Smith. They were not themselves
identifying Smith. They did not know
Wells had any reason to lie about
much as they had to. Neither Thomas nor
that Thomas and Wells would only say as
prosecution. The circumstances indicated
more than he knew in order to help the
that either Thomas or Wells would say
reason for the prosecution to believe
able to identify Smith. There was no
Thomas and Wells would lie about being
prosecution had no reason to believe that

of the events at the Tote-Sum store, the
In light of their detailed knowledge
investigators.
secretly recorded by Smith's
the trial, and in the conversation
follow-up statement to the detectives, at
describe the attack in detail in his
attack. Nevertheless, Wells was able to
on the far side of the car from the
it as well as Thomas since he was driving
although he probably could not have seen
Wells obviously saw the attack, too,
private investigators.
substantially the same details to Smith's
has not denied that fact; he repeated
assault in great detail. Thomas himself
that Thomas actually witnessed the
found on the lot. There can be no doubt
door while the shoe and her glasses were
brass knuckles -- were found near the
of a struggle -- the keys, money, and the

> A. She got out of the car and I believe she locked the door and walked straight to the building and, on the way from the car to the building she was going in her purse, looking for her keys, I imagine, and that's when they walked up to each other and I could see it then.

(T.R. 543, 545, 556). The details described by Thomas were supported by the known circumstances of the case. Thomas correctly saw that Roberts was going to open the store, and the timing and location of the assault as he saw it explains the location of physical evidence found at the scene. Thomas said that Roberts had first gone to the door looking for keys in her purse, and then turned from the door to meet her assailant. That explains why the outer padlock was off, while the door itself was still locked. Thomas said the assailant grabbed Roberts near the door, held her around the neck and dragged her toward his car, explaining why the signs

A. . . . Well, we went there and we was coming back - as we was coming down Robinson Street toward Ellis Avenue, this grey car pulled into this Tote-Sum Store and this red Pinto was sitting there parallel to the building, and, as we were coming by, a lady got out of the car, going in her purse, and then walked up to the door and this guy - he was standing outside the Pinto with the door open and he walked from the car toward the lady at the store and she started meeting him - started walking toward him - going in her purse with her head down and he walked up to her and grabbed her around the neck, started trying to drag her to the car and I was telling James to stop the car and he said he wasn't going to stop. . . .

. . . . .

A. Well, he walked up to her and threw his arm around her neck like this (witness demonstrating) and I couldn't see what he was doing with his hand but he had her - I don't know if he had his hand over her mouth like this or whatever - I couldn't see - but, first, when he grabbed her around the neck and his hand was up there, he had bent down like that and I couldn't see it but he walked like that to his car.

. . . . .

A. She took about 3 or 4 steps from the door toward him by the time he had met her and he put his arm around her and then took her all the way to the car. . . .

believe their testimony when they gave it. At the time of the trial, however, the prosecution had no reason to question their sincerity. The evidence proved unequivocally that Thomas and Wells had seen Roberts' assailant and his red Pinto and that they were able to describe the attack on Roberts in accurate detail. They were able to describe the assailant's clothing and build. The prosecution had reason to believe that Thomas and Wells might be able to identify Smith.

The evidence in the record confirms that the trial testimony of both Thomas and Wells was accurate in great detail. Thomas has repeatedly described the attack in detail, and those details are corroborated by the evidence found at the scene. At the trial Thomas described what he saw as follows:

false testimony to obtain a conviction. Mooney, 294 U.S. 103.

2. No Use of Perjury

Applying the holding of Mooney to the evidence in the record, the Court finds that the prosecution did not knowingly use false testimony at Smith's trial. As an alternative holding, should the Court's reading of the law prove incorrect, the Court finds in addition that the prosecution did not negligently use false testimony. The prosecution could not and should not have known that Thomas and Wells were lying when they identified Smith, if in fact they were.

Perjury is a matter of sincerity, not of accuracy or probative value. Testimony which is sincerely given may be mistaken in fact. To prove his claim, Smith must prove that the prosecution knew that Thomas and Wells did not

information on each case to every lawyer who deals with it.

Id. at 154.

The strict rule of Giglio is feasible because the information in question is actually in the hands of the prosecution. The challenged testimony described an action taken by the prosecution, that is, the making of a promise in return for testimony. This Court refuses to accept Smith's proposition that the Supreme Court meant to require the prosecution to guarantee similarly the truth or accuracy of all the testimony which it solicits.

Smith has offered no other authority to show that the prosecution's choice of witnesses must be reviewed for negligence. The Court is of the opinion that the proper standard for constitutional review under Mooney is whether the prosecution knowingly used

immunity. Id. at 153. The district court relied on that fact to hold the assistant's promise irrelevant. Reversing, the Supreme Court expressed no opinion about the subjective truthfulness of the government witness and concerned itself instead with the objective accuracy of his testimony:

> The heart of the matter is that one Assistant United States Attorney -- the first one who dealt with [the witness] Taliento -- now states that he promised Taliento that he would not be prosecuted if he cooperated with the Government.

Id. Noting that evidence of any understanding or agreement would be relevant to a witness' credibility, the court imposed on the government a duty to insure the accurate disclosure of all such discussions:

> To the extent that this [holding] places a burden on the large prosecution offices, procedures and regulations can be established to carry that burden and to insure communication of all relevant

> is spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government. [citations omitted].

Id. at 154 (emphasis added).

Giglio is not a case of recanted testimony. The new evidence in Giglio was an affidavit by the assistant U.S. attorney who had made the promise, but who was not present at the trial. There is no indication in the opinion that the government witness himself had recanted, and it appears plausible that the witness may have truthfully stated his understanding of his agreement with the government as it had been explained shortly before the trial by the assistant's superior. The United States Attorney filed an affidavit in the case stating that he had met personally with the witness before the trial to emphasize that the witness had not been guaranteed

witness about promises made by the government in return for testimony against the defendant.

Smith relies on a single reference to negligence in Giglio to support his argument. The reference itself is ambiguous. It could refer either to the failure of the assistant U.S. attorney to report an agreement to his superiors and his associates or to the failure of the government as an entity to correct inaccurate testimony after it was introduced at trial. In either event, the statement, the second in the quote below, is applicable only to the particular circumstances of the case:

> In the circumstances shown by this record, neither [Asst. U.S. Attorney] DiPaola's authority nor his failure to inform his superiors or his associates is controlling. Moreover, whether the non-disclosure was a result of negligence or design, it is the responsibility of the prosecutor. The prosecutor's office is an entity and as such it

This principle is recognized by the decision in Brady v. Maryland, 373 U.S. 83 (1963), under which the state is required to disclose favorable evidence to the defense but not to the jury. Brady does not require the state to impeach its own witnesses or to refrain from using a witness if there is a reasonable doubt about the truth of some matter to which the witness may testify. The prosecution's duty under the Constitution regarding such testimony should be satisfied if it discloses evidence favorable to the defense as required by Brady. See Agurs, 427 U.S. at 111 & n.19.

Giglio v. United States, 405 U.S. 150 (1972), does not support Smith's proposition regarding negligence. The case dealt with a special type of testimony: testimony by a government

Mooney, 294 U.S. at 110. Deciding whether the allegation stated a claim, the Supreme Court held that the due process clause of the Fourteenth Amendment

> cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured.

Id. at 112. This holding envisages proof of both actual knowledge and intent on the part of the prosecution. The analysis is not applicable to cases in which the prosecution has no actual knowledge but rather must draw conclusions about a witness' truthfulness from conflicting evidence. The purpose of an adversarial trial is to allow the jury to draw such conclusions.

disproportionate effect on the judgment of a jury that he is entitled to a new trial regardless of the overwhelming evidence against him if the state used a perjured eyewitness identification at his trial.

To invoke the strict standard of review, Smith argues that he may prove that the state "used" perjured testimony by showing that the state was negligent. In other words, he argues, he need only show that the state <u>should have known</u> that the testimony was perjured. The Supreme Court decisions in <u>Mooney</u> and subsequent cases do not support Smith.

The petitioner in <u>Mooney</u> alleged

> that the sole basis of his conviction was perjured testimony, which was knowingly used by the prosecuting authorities in order to obtain that conviction, and also that these authorities deliberately suppressed evidence which would have impeached and refuted the testimony thus given against him.

§ 2255 petition based on a recanting affidavit).

In light of the contradictions and the conflicting motives apparent in the recanting statements as compared with the substantial accuracy and strength of the trial testimony, this Court agrees with the state trial judge that the recanting statements do not prove that the trial testimony was perjured. At most, the recanting statements prove only that Thomas and Wells had second thoughts about their ability to identify Smith; that they feared and misunderstood the police and prosecuting authorities; that they resented the fact that they had been forced to accuse Smith publicly; and that they wanted to blame their having done so on the police, perhaps to avoid any future role in the case.

denial without a hearing of a 28 U.S.C. § 2254, 220 (D.C. Cir. 1982) (affirming the e.g., United States v. Kearney, 682 F.2d trial judge for their evaluation. See, and have deferred to the judgment of the recanting affidavits with great suspicion courts traditionally have treated trustworthy is typical of the reasons why reasons to recant which are not evidence that Thomas and Wells had themselves from their testimony. This Smith and that they wished to distance been forced to testify publicly against men that Thomas and Wells resented having second statement taken from each of the the contradictions between the first and apparent from these statements and from against Smith was so strong. It is had not been necessary because the case especially their identification of Smith, that their testimony at the trial, and

investigators both stated that they felt in their statements to Smith's the strength of the case against Smith. trial after they testified and learned of

Both Thomas and Wells watched the over his testimony. by Smith's family in an angry exchange trial, he and his mother were confronted testimony was unnecessary. After the become involved and that he thought his trial that his family pressured him no to do to the trial. Thomas explained at the

Like Wells, Thomas did not want to Smith. disavowing only his identification of assault in detail, as he had at trial, admitted his role and described the office interview, in contrast, Thomas and had testified at the trial. In the and another man had witnessed the assault Smith trial. He told Walker that Wells

In the subsequent office interview, however, Wells told Cowling that he did not see anything at all himself and was not even aware that Thomas had seen anything until he was contacted by the detectives the next day. Wells' statement to Cowling is completely implausible in light of the substantiated testimony by both Thomas and Sgt. Oatis. The statement is an apparent attempt to avoid having any more to do with the investigation. Smith does not urge that the entire statement be taken as true; he focuses only on the in-court identification.

Like Wells, Thomas told one story when he did not know he was being investigated and another in the office of the private investigator. When secretly recorded by Walker, Thomas did not admit that he had had anything to do with the

Walker, who was also present for the office interviews, questioned Thomas or Wells about those contradictions. Cowling prepared the affidavits in the record from the statements recorded in his office.

The recanting affidavit by James Wells and the statement to Cowling on which it is based are not credible. Wells never wanted to be involved with the case. He refused to stop the car to help Roberts, and he did not volunteer to talk to Sgt. Oatis. When the detectives continued the investigation the following week, Wells refused to return their calls, and when found he at first denied any knowledge of the crime. In the conversation secretly recorded by Walker, Wells admitted that he had witnessed the attack on Roberts, and he described the attack in detail, as he had at the trial.

Smith obtained the recanting statements in the course of preparing his petition for habeas corpus. In October 1983, Smith's habeas counsel hired Allen Cowling, a private investigator, to find Thomas and Wells and question them about their testimony at the trial. One of Cowling's employees, William Walker, happened to be an acquaintance of Wells. Walker sought out Wells and Thomas separately and without revealing his purpose led them to discuss the Smith trial in casual conversation, which Walker secretly recorded. Later Cowling formally interviewed Wells and Thomas separately in his office and with their consent recorded portions of those interviews. In both cases, the statements recorded by Cowling dramatically contradict those previously recorded by Walker. Neither Cowling nor

has changed his description of the assailant.

Having heard their testimony at trial, the prosecution had no reason to question Thomas' and Wells' sincerity about their identification of Smith. The two men's explanations for their testimony were highly plausible. The trial judge was persuaded at the time that their testimony was true. He continued to believe so even after reviewing the recanting statements obtained by Smith.

Smith relies principally on recanting statements obtained from Thomas and Wells to prove that their testimony was perjured and that that fact was known to the prosecution. The Court finds that those recanting statements are not credible on these matters for the reasons set out below.

A. That's correct.

. . . . . .

Q. All right, I want to ask you how it happens that four months later you can identify someone in court someone you couldn't identify that morning?

A. I couldn't describe him but I knowed that his face looked familiar, so when I saw the picture again yesterday morning, I knew that that was the man that was driving the Pinto on the parking lot at the Tote-Sum Store.

(T.R. 647) (emphasis added).

Defense counsel attempted to undermine Thomas' and Wells' testimony by asking them to describe the assailant. Both Thomas and Wells responded by describing physical characteristics such as age, height, complexion, build and hairstyle, which corroborated their identification of Smith. Both recalled that the assailant was wearing brown or khaki pants. Neither Thomas nor Wells

insisted, however, that he recognized

Smith in a photo lineup before the trial:

Q. You couldn't identify him when you talked to the police?

A. That's correct.

Q. You couldn't identify him when Mr. Jamison Gregg and the Defendant's two sisters came to see you could you?

A. Correct.

Q. You couldn't identify him then.

A. That's correct.

Q. Mr. Wells, on your oath, tell us whether or not you can identify him this morning or tell us whether or not you are identifying a picture?

A. I don't understand the question.

Q. Are you identifying the Defendant - this man - as the man who was out at the Tote-Sum Store or are you identifying a picture?

A. I am identifying the man.

Q. You are identifying the man.

A. Correct.

Q. For the very first time.

A. Right.

Q. They told you that?

A. Yes, sir.

Q. Mr. Peters told you that?

A. No, sir.

Q. Who told you that?

A. I believe it was Lt. Bartlett.

Q. All right. What else did he threaten you with?

A. He didn't threaten me.

Q. That was a threat wasn't it?

A. No, sir.

Q. He told you that you were going to jail, didn't he?

A. He told me that if I perjured myself while I am on probation that I would - that they could give me my time back. That's what he said.

(T.R. 609-10) (emphasis added).

Like Thomas, Wells admitted on cross-examination that he had previously said he could not identify Smith. Wells

A. Right.

Q. But that's what you told them?

A. Right.

Q. Then you told them a lie, didn't you?

A. Yes, sir.

(T.R. 610-11) (emphasis added). Thomas denied that he had been offered any deal or threatened by the District Attorney's office:

Q. All right. Did anybody discuss with you yesterday the possibility that you might not in the future have to report to the parole officer?

A. No sir. They told me if I came in here lying I would be doing it a whole lot longer.

Q. Okay.

A. After I got through with my 22 years, you know.

Q. They told you if you were lying - if you were lying about anything in this trial.

A. I'm going to jail. Right.

Q. You are going to jail?

was and get the evidence on him, that's fine. You know, I don't want to be sitting here no more than he wants to be sitting over there, you know.

Q. All right. But you told the people who visited you on July 18, that you couldn't identify him. Is that right?

A. Right.

Q. But now you are telling us that you could identify him?

A. At the time I didn't want to have anything else to do with it but, when I got my subpoena, that was it. I knowed that what I had to do, you know, or either I could get back in serious trouble about it.

Q. Are you telling us that when they visited you on July 18, 1981, at that time you couldn't identify the man?

A. No, sir. I told them I couldn't.

Q. All right.

A. The same thing I told the police at the time of the lineup.

Q. But aren't you telling us this morning that, on July 18 of 1981, you could have identified him but you didn't want to?

and identify Smith after being subpoenaed

to testify under oath at trial:

Q. All right. On July 18 [at an interview with Smith's sisters and the defense attorney's son] you couldn't identify this man, could you?

A. I didn't.

Q. And you had been to the suppression hearing before this man, Jamison Gregg, and the two black ladies [Smith's sisters] came to see you?

A. I believe that was before then. Yeah, that's right.

Q. You had been to the suppression hearing and you had seen him there and up here in the courtroom and on July 18, after the suppression hearing, you couldn't identify him on that date.

A. Can I say something?

Q. Anything you want to.

A. By that time, I could have, but I didn't want to. I felt that with the pressure I was getting from my Mother and my other relatives I felt like after I had done told them that this was the guy in the car - I mean told them about the car - and if they could get whoever it

and that he told the district attorney so on the first day of the trial:

Q. Was this man in the police line up?

A. Yes, sir.

Q. Have you told anybody that before?

A. No, sir. Since then, I have.

Q. You have?

A. Yes, sir.

Q. You had told somebody that before?

A. Yesterday.

Q. Yesterday?

A. Yes sir.

Q. When you talked - did you talk to the District Attorney?

A. Yes, sir.

(T.R. 604). Thomas voluntarily explained at length that he deliberately pretended not to be able to identify Smith to avoid having to go to trial, and that he concluded that he had to tell the truth

the police could not possibly have affected the judgment of the jury.

3. The Suppression Hearing

A Fourth Amendment claim for suppression of illegally obtained evidence may not be raised on habeas if the state "provided an opportunity for full and fair litigation" of the claim. Stone v. Powell, 428 U.S. 465, 494 (1976); Perry v. Lynaugh, 832 F.2d 915, 918 (5th Cir. 1987). Smith argues that the hearing to suppress the evidence obtained from him and his car at the time of his arrest was not adequate because the unavailability of the police record precluded effective cross-examination of the state's witnesses.

The police record does not, however, prove that Thomas and Wells had not provided Sgt. Oatis with the information to which Sgt. Oatis testified at the

543 F.2d at 651-52.

No material evidence about Thomas' relationship with the police was suppressed in this case. Thomas was not a confidential informant in the sense intended by Smith's discovery request. His identity as a witness was disclosed. He did not approach Sgt. Oatis as an informer, and he had no special relationship with the investigating officers, who were unaware that he had any special relationship with the police. Thomas was not paid for and did not receive any deals in return for his testimony against Smith. The fact that Thomas had an ongoing relationship with law enforcement, because he was on probation, was brought out and fully explored by the prosecution at the trial. Under the circumstances, additional information about his relationship with

rejected the defendant's claim because of circumstances similar to these. Quinn was convicted of participating in a conspiracy to bribe a juror. The members of the conspiracy sought to approach the juror through her son, Probst, with whom they happened to be acquainted. Probst had previously served as an informant for the FBI. After being approached about bribing his mother, he called his contact in the FBI to report the attempted crime and subsequently cooperated with the FBI in gathering evidence of the conspiracy. The Eighth Circuit rejected the contention that Probst's prior dealings with the FBI had any relevance to his credibility in the case against Quinn.

> What, if anything, Probst may have done for the Bureau in years prior to 1974 had nothing to do with whether Quinn had attempted to bribe Mrs. Probst or with what Probst did in assisting the Bureau in developing this case.

> at that time I asked, or was told, that Mr. Thomas was basically an informant for the Burglary Division of the Jackson Police Department and I asked them or Lt. Tier, who was head of that division at the time, to see if he could find Mr. Thomas for me.

(H.R. 329). Detective David Fondren of the Jackson Police Department, who testified at the hearing about his follow-up interviews with Thomas and Wells during the week after Roberts was murdered, testified that he did not know at that time that Thomas was an informant but that he had heard since the trial that Thomas provided information to some people in the department. (H.R. 520). Fondren testified that Thomas' status could not be documented because the Jackson Police Department did not keep records on informants. (H.R. 521).

In United States v. Quinn, 543 F.2d 640 (8th Cir. 1976), on which Smith relies, the Eighth Circuit ultimately

> identity of any and all confidential informants who depict themselves as eyewitnesses to the event or events constituting the charge against Defendant.

Smith argues that the state chose to ignore the Court's order requiring identification of informants.

Smith relies on evidence which came out at the perjury hearing in state court. At the hearing, William S. Boyd of the Office of the Attorney General of the State of Mississippi took the stand to testify to statements which he had obtained from both Wells and Thomas in 1984 as part of his investigation of the perjury allegations. Boyd testified as follows:

> . . . we were having extreme difficulty finding Mr. Thomas. And

though Smith had specifically requested disclosure of any informants. Smith's discovery motion requested disclosure of the

when he testified at the trial even Kenneth Thomas was a police informant prosecution suppressed evidence that suppression claim, Smith asserts that the As the second ground for his

2. The Informant

simply because the information may become useful to the defense. Agurs, 427 U.S. at 109.

required to disclose his entire file tested. The prosecution is not were not apparent before the witnesses state's witnesses. The inconsistencies inconsistent statements to impeach the only as a source of additional prior Smith. Smith could have used the record contained only strong evidence against evidence favorable to Smith. It reasonably believed that it contained no record at the time of trial would have is not guilty. Anyone reading the police

motion for discovery requested "Names and addresses of all witnesses in chief and their statements proposed to be offered by the State of Mississippi at the trial." Smith knew that Thomas and Wells were the eyewitnesses. Smith's representatives had interviewed Thomas and Wells before the trial and knew of the substance of their testimony. Smith knew that Thomas and Wells had not identified him to the police, and Smith obtained statements from Thomas and Wells stating that they could not identify him. No evidence from the police report was suppressed. Smith had the information.

Brady requires disclosure of information "favorable" to the defendant. 373 U.S. at 87. The information in the police record in this case was not favorable. There is no evidence in the police record which suggests that Smith

the morning of the crime. Smith argues that this information would have been useful in assailing credibility of the eyewitness testimony because the records omit details to which the witnesses testified at trial. Smith's argument was expressly rejected in the United States v. Agurs:

> If everything that might influence a jury must be disclosed, the only way a prosecutor could discharge his constitutional duty would be to allow complete discovery of his files as a matter of routine practice.
>
> Whether or not procedural rules authorizing such broad discovery might be desirable, the Constitution surely does not demand that much.

427 U.S. at 109.

The record demonstrates that Smith was provided by the prosecution with the information to which he was entitled and that at the time of trial Smith had been effectively provided with the information in the police report. Smith's pretrial

Bagley, 473 U.S. at 675 (citing United States v. Agurs, 427 U.S. 97, 108 (1976)).

Smith argues that he was deprived of due process because the prosecution refused to disclose: (1) information in the police report demonstrating that neither Thomas nor Wells could identify the assailant; and (2) that Kenneth Thomas was a police informant when he testified at trial. Smith argues in addition that the non-disclosure of the police record rendered his suppression hearing inadequate.

1. The Police Record

Smith argues that he was entitled to obtain from the police record the signed statements by Thomas and Wells, the lineup report, the reports by the investigating officers, and the notes of the police radio communication calls from

whether the prosecution knew of the perjury. This Court finds that the prosecution did not and could not have known that the identifications were perjured. The prosecution like the trial judge had good reason to believe the testimony.

B. WITHHOLDING OF EVIDENCE

In Brady v. Maryland, 373 U.S. 83, 87 (1963) the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material. . . ." In United States v. Bagley, 473 U.S. 667 (1985), the court reaffirmed that "the prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial."

and Wells had not identified Smith before the trial and had recanted since the trial. At the trial, Thomas and Wells were cross-examined at length about their prior inconsistent statements. The trial judge was there to hear that testimony and to observe the demeanor of the witnesses. He presided over the hearing in which Smith and the State introduced evidence regarding the recanting statements made by Thomas and Wells. When the record is considered as a whole, it is impossible to conclude that the trial judge's factfinding was clearly erroneous.

This Court expresses its opinion on the perjury allegations only to place them in perspective. Under the federal standard of review applicable here, it is immaterial whether the identifications were in fact perjury. The question is

perjury proved by the fact that Thomas
The Mississippi Supreme Court found
1982), cited in Smith, 492 So. 2d at 264.
v. State, 413 So. 2d 737, 740 (Miss.
aside unless clearly erroneous. Riddle
recanted testimony should not be set
that a trial court's evaluation of
testimony with suspicion and which holds
traditional rule which treats recanted
§ 2254(d)(8). Mississippi follows the
were perjured. See 28 U.S.C.
Court that the in-court identifications
the conclusion of the Mississippi Supreme
taken as a whole does not fairly support

This Court finds that the record

Id. at 264.

identification testimony was perjured.
the issue of perjury, finding that the
the fact finding of the trial judge on
Supreme Court disagreed, however, with
State, 492 So. 2d 260 (Miss. 1986). The

Wells, in which both men contradicted or withdrew parts of the statements they had made to Cowling. The District Attorney and two of his assistants, who had tried Smith, testified about their preparation for the trial. Four police officers testified to statements made by the witnesses during the investigation of the crime, and the entire police record of the investigation was introduced. The entire record of this proceeding, along with a transcript of the trial, were presented to this Court for review.

After the hearing the trial judge concluded that the recanting statements and other evidence failed to establish that Thomas and Wells had lied at the trial. The Mississippi Supreme Court affirmed the trial judge's decision denying relief, finding that the evidence of guilt was overwhelming. Smith v.

The judge who presided over the trial also presided at the hearing ordered by the Mississippi Supreme Court on Smith's allegations of perjury. In re Smith, 457 So. 2d 911 (Miss. 1984) (ordering hearing). At that hearing, both Thomas and Wells refused to testify, exercising their Fifth Amendment right against self-incrimination. Cowling and Walker testified about their conversations with Thomas and Wells and introduced transcripts of the recordings of those conversations. In addition, Smith offered physical evidence to prove that it was impossible for Thomas and Wells to identify Roberts' assailant because of the lighting in the parking lot and their distance from it. William S. Boyd of the Attorney General's Office of the State of Mississippi testified about his interviews with Thomas and

evidentiary hearing on the allegations and entered extensive findings of fact. The evidence did not establish "an inference that the prosecutor was bent on striking Negroes, regardless of trial-related considerations." Swain, 380 U.S. at 225-26. See Evans, 821 F.2d at 1067-68. Smith, therefore, cannot show actual prejudice resulting from the alleged violation.

In addition, Smith has not shown sufficient cause for the failure to follow required procedures. Smith knew that the prosecutor exercised all of his strikes against Blacks. It is irrelevant that Smith did not have actual knowledge of Peters' practice in all capital cases. Had he felt himself aggrieved, Smith could have sought to discover that information. Smith is properly barred from raising the claim now.

In Edwards the Court conducted a full *Cabana*, 821 F.2d 1065 (5th Cir. 1987). 1987) (pub. pend.), aff'd, *Evans v.* No. 187-0081(B) (S.D. Miss. June 26, pending); *Evans v. Thigpen*, Civil Action (S.D. Miss. June 26, 1987) (publication *Thigpen*, Civil Action No. 183-056(B) establish violation of *Swain*. *Edwards v.* finding that Peters' statements did not the subject of two opinions by this Court Peters' statements have already been exclusion within the meaning of *Swain*. established a case of systematic Smith asserts that Peters' admissions 595 F. Supp. 1271 (S.D. Miss. 1984). in connection with *Edwards v. Thigpen*, district attorney, Ed Peters, was deposed subsequently, he contends, when the to support the objection arose the meaning of *Swain*. The factual basis strikes of Blacks were systematic within

Smith argues that the prosecutor's use of the State's peremptory challenges violated Swain v. Alabama, 380 U.S. 202 (1965), the controlling precedent at the time of trial and direct appeal. When Smith first raised this claim on his third petition for post-conviction relief, the Mississippi Supreme Court held the issue barred by the failure to object at trial or on direct appeal. Smith v. State, 500 So. 2d 973, 974-75 (Miss. 1986). Smith argues that he can demonstrate "cause" for his failure to follow the procedures and "actual prejudice" from the alleged violation. Reed v. Ross, 468 U.S. 1, 11 (1984); Engle v. Isaac, 456 U.S. 107, 129 (1982).

As cause Smith asserts that the factual basis for the claim was not available to him at the trial because he did not know that the prosecutor's

paroled if sentenced to life. Smith did not object to these comments at trial or on direct appeal, and the Mississippi Supreme Court held that the argument was procedurally barred. Smith v. State, 434 So. 2d 212, 216 (Miss. 1983). The state procedural bar effectively precludes the claim from federal review. Edwards v. Thigpen, 595 F. Supp. 1271 (S.D. Miss. 1984). It is apparent, moreover, that the comments did not "so infect the trial with unfairness" as to make the sentence a denial of due process. Darden v. Wainwright, 91 L. Ed. 2d at 157.

D. EXCLUSION OF BLACKS

The prosecutor used all 12 of the state's peremptory challenges to strike Blacks from the jury. No objection was made by Smith's counsel. Three members of the jury were black.

Roberts' public comings, for example, was probative evidence to connect Smith to Roberts' body. The state introduced photographs of Roberts' body, which showed her clothing out of place, to allow Dr. Galvez to identify the body as the one on which he performed the autopsy in rebuttal to Smith's argument that the body had not been properly identified. Under the circumstances of this case, there was no way to avoid the evidence of sexual abuse without unduly burdening the state's ability to prove murder. The evidence of Smith's guilt on the capital charge was, moreover, so overwhelming that the verdict could not possible be deemed the result of prejudice.

2. Parole

Smith argues that it was unconstitutional for the prosecutor to suggest that Smith might eventually be

introduction of the hair analysis of evidence to which Smith now objects. The necessary the admission of all the

These trial tactics by Smith made pants when they were stained with Roberts' blood.

someone else had been wearing his khaki contrived an alibi to suggest that exculpated Smith. Smith himself oversight of a procedure which might have found on Smith's hand as a deliberate the state's failure to type the blood belongings, and he vigorously attacked Smith's fingerprints on Roberts' referred to the state's failure to find murder. Smith's trial counsel repeatedly insufficient to connect him to the trial was that the evidence was

Smith's only real defense at the inextricable from the evidence of murder.

rape because the evidence of rape was

construction of the especially heinous aggravating circumstance, meets these constitutional requirements.

Johnson v. Thigpen, 806 F.2d 1243, 1247 (5th Cir. 1986). The evidence shows that Roberts was abducted, sexually abused and manually strangled to death. The prosecution did not offend the Constitution of the United States by arguing that all of that evidence should be considered to show that the murder was especially heinous, atrocious or cruel, for the limited purpose for which that aggravating factor is used under the Mississippi statutory scheme. Johnson, 806 F.2d at 1245-49.

Smith argues incidentally that the evidence of rape rendered the guilt phase of the trial fundamentally unfair. The argument is without merit. Especially in light of Smith's defense, the trial court could not have excluded the evidence of

similar to Smith's was found in her public
combings. The implications of this
evidence were obvious to the jury. The
fact that the prosecution articulated the
implications at the sentencing could not
have prejudiced the jury.

It is irrelevant that rape had not
been formally charged as a separate
aggravating factor. Federal law does not
prevent the use of evidence of rape in
support of the especially heinous
aggravating circumstance of the
Mississippi statute. The Fifth Circuit
has held that the failure of the State of
Mississippi consistently to define the
especially heinous aggravating
circumstance in capital cases does not
make the imposition of the death penalty
under the Mississippi statute
unconstitutional:

> The Mississippi sentencing
> scheme, even without a limiting

capricious or prejudicial. As Smith admits, the prosecution carefully guarded against any reference to rape at the guilt phase of the trial, repeatedly cautioning its witnesses to avoid any reference to those allegations. The prosecution had to caution them because the evidence of sexual abuse was substantial and apparent to everyone. It is obvious that the motive of this crime was not simply robbery. Roberts was alone in a darkened parking lot early on a Sunday morning when she was accosted. She was nevertheless abducted and taken to Smith's apartment. Her sweater and her purse were found on his bed. Her body was found with her pants unbuttoned, her shirt on inside out and her brassiere pulled out of place. Hairs similar to her head and public hair were found on Smith's bed. A negroid public hair

that the prosecutors' remarks were undesirable or even universally condemned." Id. at 157.

The prosecution's references to the evidence of sexual abuse did not render the sentencing unfair. The verdict of capital murder at the guilt phase of the trial constituted a finding beyond reasonable doubt that the murder had been committed during the course of a robbery, and that verdict is supported by overwhelming evidence. The same charge constituted one of the aggravating factors found by the jury. Only one aggravating factor was necessary, and it cannot be doubted that the jury would have found the aggravating factor of robbery regardless of the injection of the rape argument by the prosecution.

The prosecution's reference to sexual abuse was, moreover, hardly

dain and heinousness. Under the Mississippi statute, rape or sexual battery may also be charged as an aggravating factor, but these were not charged against Smith. The prosecution argued the rape allegations apparently in support of the charge that the murder was heinous.

On a writ of habeas corpus, the appropriate standard for review of claims of improper argument by the prosecution is "the narrow one of due process, and not the broad exercise of supervisory power." Darden v. Wainwright, 91 L. Ed. 2d 144, 157 (1986)(citing Donnelly v. DeChristoforo, 416 U.S. 637, 642 (1974)). The relevant question, therefore, is whether "the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" Id. It is "not enough

which had not been proven, in violation of the rule of Presnell v. Georgia, 439 U.S. 14, 16 (1978) (quoting Cole v. Arkansas, 333 U.S. 196, 201-02 (1948)):

> It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made. . . .

Smith's allegations do not state a claim. The decisions in Presnell and Cole have no bearing on this case. In both of those cases, state courts had vacated the jury verdict on the capital crime but had affirmed the death sentence anyway. There is no such discrepancy in this case. Smith was properly convicted at the guilt phase of murder committed during the course of a robbery, under Miss. Code Ann. § 97-3-19(2)(e). He was sentenced to death under Miss. Code Ann. § 99-19-101(5) after the jury found the aggravating factors of robbery, pecuniary

crime. The Pinto made a u-turn within sight of his patrol car. Sgt. Oatis had more than adequate grounds to stop the Pinto. As he stopped the Pinto Sgt. Oatis saw Smith place something under the right-hand seat of his car. Sgt. Oatis had good reason to suspect that the driver was hiding a weapon. Smith was belligerent when stopped, and he had a blood stain visible on his hand. The arrest of Smith and search of his car were not illegal.

C. IMPROPER ARGUMENT

1. Rape

Smith asserts that he was deprived of due process because at the sentencing phase of his trial the prosecution argued that he had sexually abused and raped Roberts. Smith argues that he was thereby sentenced to death for a crime for which he had not been charged and

suppression hearing. A little over an hour and a half elapsed between the time Thomas first approached Sgt. Oatis and the discovery of Roberts' body. The police reports cannot reasonably be considered to be comprehensive of every statement made or everything observed by the witnesses and officers during that hour and a half.

It is beyond question that Sgt. Oatis had probable cause to stop the red Pinto, regardless of the accuracy of his recollection at the time of the suppression hearing of what Thomas and Wells had told him at the Tote-Sum Store. Thomas and Wells identified the assailant as a black man in a red Pinto. Within 30 minutes of that report, at approximately 6:00 A.M. on a Sunday morning, a time of little traffic, Sgt. Oatis saw a red Pinto returning to the scene of the

APPENDIX E

MR. WHITE: No, I don't think there is any automatic rule in effect here. I mean, the Mississippi Supreme Court has --

QUESTION: You don't read the opinion as suggesting that's its rule, then?

MR. WHITE: No. I mean, I don't read the opinion that way. I mean, it seems -- I guess when it says the invalidity of one will not disturb a sentence of death, they do look at that, that aggravating circumstance though, and --

QUESTION: Do they say that in the opinion anywhere? Did I miss it?

* * *

* * *

heinous, atrocious and cruel. The court looked at that again and said although there remains one aggravating circumstance that is not invalid, that of the to avoid lawful arrest, because of the problems with heinous, atrocious and cruel, we will -- and then the invalidity of the one that this Court set aside, the prior conviction that was overturned, the Mississippi Supreme Court said we cannot, with the invalidity of two, with this one remaining, we cannot say that it, what the jury would have done at that time.

But we -- we reaffirm --

QUESTION: But does it have an automatic rule that if there are two aggravating circumstances, and one drops out, that it will affirm --

QUESTION: Does it have just a flat, automatic rule, so long as one aggravating circumstance remains, it will affirm a death penalty?

MR. WHITE: No, Your Honor.

QUESTION: No?

MR. WHITE: That has been most recently graphically pointed out in the remand in Johnson v. Mississippi. There they also found, and -- in the state cited in my brief, they found the other two remaining aggravating circumstances were the avoidance of lawful arrest and

* * *

* * *

conclusion. And in this case federal constitutional error tainted that process and left the balance unskewed.

I will reserve the remainder of my time.

QUESTION: Very well, Mr. Resnick. Mr. White, we'll hear now from you.

ORAL ARGUMENT OF MARVIN L. WHITE, JR. ON BEHALF OF THE RESPONDENT

MR. WHITE: Mr. Chief Justice, and may it please the Court:

Of course, the issue is very clear here, whether the Mississippi Supreme Court can interpret its own laws, as I think that this Court has said many times that it can, to allow it to affirm a death case or sentence where there is the presence of one aggravating circumstance that is invalid.

IN THE SUPREME COURT OF THE UNITED STATES

---x
:
CHANDLER CLEMONS,
:
Petitioner
: No. 88-6873
v.
:
MISSISSIPPI
:
---x

Washington, D.C.

Tuesday, November 28, 1989

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:46 p.m.

APPEARANCES:

KENNETH S. RESNICK, ESQ., Cincinnati, Ohio; on behalf of the Petitioner.

MARVIN L. WHITE, JR., ESQ., Assistant Attorney General of Mississippi, Jackson, Mississippi; on behalf of the Respondent.

APPENDIX D

by this Court remains in effect pending this Court's consideration of Petitioner's anticipated application for a certificate of probable cause. See Johnson v. Cabana, 818 F.2d 333, 344 (5th Cir. 1987). In the event that an appeal from this decision is not taken, this Court will consider, on motion of the State, lifting the stay.

ORDERED this the 13th day of June, 1988.

/s/
UNITED STATES DISTRICT JUDGE

moreover, precluded as a matter of law. Smith's racial discrimination argument rests upon the sort of statistical evidence rejected by the United States Supreme Court in McCleskey v. Kemp, 95 L. Ed. 2d 262 (1987). It is established that the broad interpretation given heinousness within the Mississippi statutory scheme is not unconstitutional. Johnson v. Thigpen, 806 F.2d 1243, 1245-49 (5th Cir. 1986). The Mississippi scheme limits the definition of capital murders sufficiently to satisfy the Constitution. The repetition of elements of the capital offense in the aggravating factors is constitutionally irrelevant. Id.

CONCLUSION

For the reasons set out in this opinion, the Writ is denied. However, the stay of execution previously granted

Smith's habeas counsel proposes a litany of errors by Smith's trial counsel in support of this claim. The alleged errors are not sufficient to undermine the reliability of the adversarial proceeding within the meaning of Strickland.

F. CONSTITUTIONALITY OF THE STATUTE

Smith raises three claims regarding the constitutionality of the Mississippi capital punishment statute as applied to him:

1. The statute is applied unfairly to Blacks;

2. Mississippi's use of heinousness as an aggravating factor is not sufficiently limited; and

3. The aggravating factors repeated elements of the underlying offense.

None of these issues was raised at trial or on direct appeal, and they are procedurally barred. The issues are,

The record in this case absolutely refutes Smith's claim of ineffective assistance. Smith's trial counsel demonstrated energy, intelligence, and dedication throughout the proceedings in spite of the overwhelming evidence against his client. No exculpatory evidence has emerged in this case. Smith's habeas counsel has come forward with no evidence inconsistent with Smith's guilt, despite an extensive subsequent investigation. Smith's trial counsel was limited, like habeas counsel, to attacking the sufficiency of the state's evidence. He did so through a detailed cross-examination of almost every witness, consistently pointing out the shortcomings of each variety of evidence. Counsel's performance elicited praise from the trial judge during the trial, and that praise was deserved.

E. INEFFECTIVE ASSISTANCE OF COUNSEL

Smith asserts that he was deprived of effective assistance of counsel under the test established in Strickland v. Washington, 466 U.S. 668 (1984). In Johnson v. Cabana, 818 F.2d 333, 340 (5th Cir. 1987), the Fifth Circuit noted the difficulty with these claims:

> This court judicially knows that the representation of a person charged with a capital offense imposes the heaviest professional responsibility known to the practice of law. Common experience and prior precedent demonstrates that collateral review of death penalty verdicts frequently include Sixth Amendment attacks on the effectiveness of previous counsel.

The court noted that effective counsel for these purposes is not "errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." Id. at 341 (citation omitted).

113

BY MR. PETERS:

Is it J. H. D. Burns? No, that's you. Mr. Richard Looper. You could not vote guilty based on circumstantial evidence?

BY MR. LOOPER:

I am not sure I understand your question. Just purely circumstantial evidence?

BY MR. PETERS:

That's the first part of the question.

BY MR. LOOPER:

That's the whole question?

BY MR. PETERS:

That's the whole question right now.

BY MR. LOOPER:

Purely circumstantial?

112

guilty based on circumstantial evidence.

Is that right?

BY MR. ROBERTSON:

The bottom line would be no, I

could not.

BY MR. PETERS:

You could not vote guilty based on

circumstantial evidence.

BY MR. ROBERTSON:

Right.

BY MR. PETERS:

I appreciate your honesty.

BY MR. ROBERTSON:

Yes, sir.

112

BY MR. DAVIS:

Right.

BY MR. PETERS:

Okay. Mr. James, so that there will be no misunderstanding, you are saying that you could not vote guilty based on circumstantial evidence.

Right?

BY MR. JAMES:

I don't think I could.

BY MR. PETERS:

You could not do that. I am not trying to corner you. It's just that the record has to be clear on that.

BY MR. JAMES:

Okay.

BY MR. PETERS:

And, Mr. Cleaver Robertson, you are saying that you could not vote

III

BY MR. PETERS:

Mr. Hambrick would not be able to.

Ms. Perkins would not be able to.

Anyone else?

BY A JUROR:

Mr. Peters, I think that's a pretty difficult question to decide. There's all kinds of circumstantial evidence.

BY MR. PETERS:

Yes, sir. You are to determine whether or not it reaches such a level that you would then rely on it but the question is would you rely on it and then you be the judge of whether it convinced you or not. And, Mr. Davis, your answer is that you couldn't rely on it but, if it was strong enough, you would follow it. Is that right?

111

BY MR. PETERS:

Anyone else?

(Jurors raising hands)

BY MR. PETERS:

Mr. Crawford, you would not be able to?

BY MR. CRAWFORD:

Right.

BY MR. PETERS:

Mr. Cleaver Robertson, you would not be able to. Is that correct?

BY MR. ROBERTSON:

That's correct.

BY MR. PETERS:

Is there anyone else that would not be able to?

(Jurors raising hand)

110

BY MR. JAMES:

Well, circumstantial evidence might be that someone makes it appear that this individual was guilty but he could not actually be guilty from the way you phrased it.

BY MR. PETERS:

Well, I am phrasing it the only way I know how.

BY MR. JAMES:

I could make a fingerprint and you could get a chance to wipe it off and you could be the culprit.

BY MR. PETERS:

Mr. James, you would not be able to as far as you can tell.

BY MR. JAMES:

Right.

BY MR. PETERS:

That's circumstantial evidence.

That's no eye witness but circumstances indicate that that's what happened.

Does everyone understand?

(Jurors nodding)

BY MR. PETERS:

Is there anyone that would not be willing to rely on circumstantial evidence in a murder trial -- in a capital murder trial? Is there anyone that would not be willing to rely on circumstantial evidence in a capital murder trial?

(No response)

BY MR. PETERS:

I got a half way up on Mr. James.

You don't know whether you would or not?

7. Mr. Barnes - Direct

Q. Whose picture is on the front of it?

A. It say--I believe it's Smith. I'm not sure. The story's in the--okay, Willie Smith.

Q. Describe the publication in terms of how many of the May issue were sold or distributed?

A. About 3,000.

Q. 3,000. And where were they distributed?

A. Primarily in Madison and Hinds County.

Q. What is the nature of your readership, people who use--your customers. Who usually buys this?

A. I have no way of knowing.

Q. Is it aimed at any particular segment of society, the black community for example?

7. Mr. Barnes - Direct

MR. JOHNNIE BARNES

upon being called to testify as a witness on behalf of the Defendant-Movant, after having been first duly sworn, testified as follows, to-wit:

DIRECT EXAMINATION BY MR. GREGG:

Q. State your name.

A. Johnnie Barnes.

Q. Mr. Barnes, I show you a publication, which is now Defendant's Exhibit A in evidence in this case and ask you if you are familiar with that and can you identify it?

A. I can.

Q. What is that?

A. Street Talk magazine.

Q. All right. And which issue am I showing you?

A. May, 1981.

Mr. Sutton - Direct 6.

A. No, sir, I wasn't working on it.

Q. Who was the--who put this issue out?

A. My brother.

Q. Who is he?

A. Johnnie Barnes. Johnnie Barnes.

Q. Is he here this morning?

A. Yes, sir.

BY MR. GREGG: If the Court please, I have nothing further of this witness and I'll call Mr. Johnnie Barnes.

BY THE COURT: Any cross examination?

BY MR. DAVIS: No, Your Honor.

(WITNESS FINALLY EXCUSED.)

6. Mr. Sutton - Direct

issues of each monthly issue were sold generally in this area?

A. No, sir.

Q. No way of knowing?

A. No, sir.

Q. All right. Was it as many as 10,000?

A. No, sir.

Q. Was it as many as 8,000?

A. No, sir.

Q. 5,000?

A. No, sir.

Q. You don't know?

A. I don't know.

Q. And are you're telling me that you did not--you were not the editor; you were not working on the paper when this issue was put out?

Mr. Sutton - Direct 5.

A. How many--how many sold or something like that?

Q. Yes.

A. I don't know.

Q. You don't know?

A. No.

Q. Well, you must have some idea. You were the editor. How many did you put out?

A. I used to be the editor.

Q. Well, this shows that you were the editor of this edition, does it not?

A. Yeah, he--my brother never did change my name on it.

Q. All right. When were last the editor?

A. Last year.

Q. All right. At that time, do you know how many

Mr. Sutton - Direct 5.

Q. Mr. Sutton, I ask you, sir, to describe this publication. What kind of publication is it?

A. What you mean about what kind of publication it is?

Q. Well, what is it--okay. Let's take the circulation. How is it circulated or distributed?

A. In the stores.

Q. In stores?

A. Yeah.

Q. And in what area is it circulated? Jackson? Hinds County? Hattiesburg? Canton?

A. Hinds County. Madison County.

Q. I'm asking you to tell the Court the number of the May, 1981 issue of Street Talk that were circulated in Hinds County?

BY MR. PETERS:

Purely circumstantial.

BY MR. LOOPER:

If it's purely circumstantial, I couldn't do it.

BY MR. PETERS:

I hate to be picky but I have to because the law requires it. I am not even questioning that it would be difficult. The question is could you do it? Could you vote guilty based purely on circumstantial evidence?

BY MR. LOOPER:

No.

BY MR. PETERS:

Your answer would be no.

BY MR. LOOPER:

Right.

BY MR. PETERS:

And that's Richard Looper. Is there anyone else that could not vote guilty based purely on circumstantial evidence?

(Juror raising hand)

BY MR. PETERS:

Mr. Hambrick, I already had your name. Anyone else now?

(Jurors raising hands)

BY MR. PETERS:

Mr. James G. Brown, you could not vote guilty based on circumstantial evidence?

BY MR. BROWN:

No.

BY MR. PETERS:

Mr. Crawford. Let me say the people I have and make sure I have everyone. I have James G. Brown, Mr. Robertson, Ms. Perkins, Mr. James, Mr. Crawford, Mr. Looper and Mr. Hambrick. Do I have everyone?

(Juror raising hand)

BY MR. PETERS:

Okay. I've got another hand. Mr. Mack. Anyone else that could not vote guilty based on circumstantial evidence?

BY A JUROR:

Are we considering sentence?

BY MR. PETERS:

No, guilty or innocence. Anyone that could to vote guilty based on circumstantial evidence?

(Jurors raising hand)

BY MR. PETERS:

Okay. Johnnie Brown and Betty McDonald. Anyone else that could not vote guilty based on circumstantial evidence?

(Juror raising hand)

BY MR. PETERS:

J. H. D. Burns.

BY MR. BURNS:

I don't know whether I could or not.

BY MR. PETERS:

Okay. You've got a question on circumstantial evidence.

BY MR. BURNS:

Right.

BY MR. PETERS:

Anyone else that could not vote guilty based on circumstantial evidence?

(No response)

BY MR. PETERS:

Of those of you who could not vote guilty on circumstantial evidence, how many of you could vote guilty on circumstantial evidence if you have an eye witness also?

(No response)

BY MR. PETERS:

Is there any one of you that couldn't vote guilty if there was circumstantial evidence combined with an eye witness?

BY A JUROR:

You are saying eye witness -- are you saying the eye witness is verifying the circumstantial evidence -- the eye witness is verifying the fact that he did, in fact, see him do the act?

BY MR. PETERS:

Well, I can't tell you that because I can't tell you what the proof is going to be but I am saying an eye witness that can tie this defendant into the incident.

BY A JUROR:

I believe I would want it to be a matter of fact when a person's life is involved.

BY MR. PETERS:

You would have to see the person doing the murder at that time.

BY A JUROR:

Right.

BY MR. PETERS:

Mr. James, you would have to have a witness that saw the murder take place. Right?

BY MR. JAMES:

Right.

BY MR. PETERS:

Mr. Crawford, you would have to have a witness that saw it?

BY MR. CRAWFORD:

There would be a question mark there. I just don't know.

BY MR. PETERS:

Okay. Let me just go as best I can. Let me call out your names as we go. Mr. Burns, would you have to have someone that saw the murder take place?

BY MR. BURNS:

I would like to have some direct evidence other than just circumstantial.

BY MR. PETERS:

But the question is would you have to have a witness that saw the murder take place?

BY MR. BURNS:

Not necessarily.

BY MR. PETERS:

All right. Mr. McDonald? Or Ms. McDonald. I don't have these Mr. and Ms. Okay, Ms. McDonald?

BY MS. McDONALD:

Not necessarily a witness but some direct evidence along with circumstantial evidence.

BY MR. PETERS:

Okay. In other words, some witness would have to tie it in -- not necessarily that saw the murder but that saw some events leading up to it?

BY MS. McDONALD:

Well, some other facts that would convince me that it could have happened.

BY MR. PETERS:

But something other than -- something less than a direct eye witness but something more than circumstantial evidence. Is that right?

BY MS. McDONALD:

Yes.

BY MR. PETERS:

Okay, thank you. Johnnie Brown, would you require an eye witness that saw the murder?

BY MR. BROWN:

Not if there was more supportive evidence.

BY MR. PETERS:

Okay. Something more than circumstantial and something less that a direct eye witness?

BY MR. BROWN:

Yes.

BY MR. PETERS:

All right. And his answer is yes. Mr. Mack, would you require a witness that saw the murder take place?

BY MR. MACK:

Not an eye witness but if it backs up the circumstantial evidence.

BY MR. PETERS:

Something less than an eye witness but more than circumstantial.

BY MR. MACK:

Right.

BY MR. PETERS:

All right. We are probably going to get into a problem here but I've got another Brown. Is that you? James G. Brown?

BY MR. BROWN:

Right. I agree with that.

BY MR. PETERS:

You feel the same as the other people. You wouldn't require an eye witness to see the murder.

BY MR. BROWN:

No.

BY MR. PETERS:

Mr. Robertson?

BY MR. ROBERTSON:

I would want very solid evidence because of the possibility of convicting an innocent person.

BY MR. PETERS:

In essence, an eye witness that saw it happen. Is that right?

BY MR. ROBERTSON:

Very solid evidence.

BY MR. PETERS:

But more than circumstantial evidence.

BY MR. ROBERTSON:

Yes.

BY MR. PETERS:

Ms. Perkins, would you require an eye witness that saw the murder happen?

BY MS. PERKINS:

Yes, I would rather have that.

BY MR. PETERS:

You would?

BY MS. PERKINS:

Yes.

BY MR. PETERS:

Okay. Now I've got James. Mr. or Mrs. James. Who did I write down? James Crawford is what I wrote down. No, Leonard James, that was you and I've already asked you. Mr. Looper?

BY MR. LOOPER:

Something more than circumstantial.

BY MR. PETERS:

Okay. Would you require an eye witness that saw the murder happen?

BY MR. LOOPER:

Just something more than circumstantial.

BY MR. PETERS:

And Mr. Hambrick?

BY MR. HAMBRICK:

Something more than that.

BY MR. PETERS:

Would you require an eye witness that saw the murder happen?

BY MR. HAMBRICK:

Not necessarily.

BY MR. PETERS:

Okay. Anyone else?

(No response)

BY MR. PETERS:

Is there anyone that would be unwilling -- that would not be willing to accept the conclusions of a medical doctor based upon his experience and education?

BY MR. GREGG:

You would hope not.

BY A JUROR:

I can't be definite but I would hope not.

BY MR. GREGG:

In other words, you would make a very conscientious effort to set aside everything that you have heard from this young man or that you have seen on TV?

BY A JUROR:

Yes, sir.

BY MR. GREGG:

Or read in the newspapers?

BY A JUROR:

Yes, sir.

BY MR. GREGG:

Would you set aside your friendship with Sergeant Otis and your friendship with your student -- and I am sure he's

a fine young man -- could you set all that aside?

BY A JUROR:

I would try to.

BY MR. GREGG:

You would make a good effort to.

BY A JUROR:

Yes, sir.

BY MR. GREGG:

Something we can't tell which way our minds are gonna jump, can we?

BY A JUROR:

Right.

BY MR. GREGG:

The record will show that I have been talking with Ms. Marie Walley. Anyone else?

(Juror raising hand)

BY MR. GREGG:

All right.

BY A JUROR:

I am Leonard James. I live in the area. I did hear some news on that. I haven't talked with anyone about it but I did know something about it through the media. There has been no discussion but, when you mentioned it, I knew exactly where it took place and the approximate time that it took place.

BY MR. GREGG:

You live out in that general area?

BY MR. JAMES:

Yes, I live just off of Robinson Street.

BY MR. GREGG:

Where do you live?

BY MR. JAMES:

742 Eastview Street.

BY MR. GREGG:

And where is that?

BY MR. JAMES:

It's between Robinson and Central Street.

BY MR. GREGG:

All right. No question in your mind about which case were are on then.

BY MR. JAMES:

Right.

BY MR. GREGG:

Have you attempted, being out there in the neighborhood -- has anyone attempted to give you any of the facts of the case?

BY MR. JAMES:

No, sir. All I know is what I read in the newspaper and what was on the radio and TV.

BY MR. GREGG:

Has it stimulated your curiosity to where you got out and did a little looking around yourself and checking out the scene?

BY MR. JAMES:

No, sir, no more than just heard of it and that was it.

BY MR. GREGG:

Do you go to that Tote-Sum store?

BY MR. JAMES:

On one or two occasions but not frequently, no, I don't.

BY MR. GREGG:

Do the members of your family go to that Tote-Sum store?

BY MR. JAMES:

Well, I couldn't swear to it if they did or they didn't.

BY MR. GREGG:

Did you know the victim in this case?

(No response)

BY MR. GREGG:

I am just going to touch on this again since we have had an opportunity to think about it. Kenneth Thomas -- does anybody know Kenneth Thomas and, if so, sing out?

(No response)

BY MR. GREGG:

James Wells, Charles Edward McDonald?

(No response)

BY MR. GREGG:

We have discussed something being on television or in the newspapers. Has anybody seen anything about this case on the television or in the newspapers?

(Jurors raising hands)

BY MR. GREGG:

All right. All right, sir. Okay. Over here?

(Jurors raising hands)

BY MR. GREGG:

In order to expedite things and I know you are getting tired and I don't want you to get tired of me, let me ask you if you have read, seen on television or heard anything on the radio -- anybody -- that would influence you to believe that this young man is guilty?

(Juror raising hand)

BY MR. GREGG:

Yes, ma'am.

BY A JUROR:

I am Betty McDonald. I have read about it in the newspaper and my opinion is the newspaper would lead you to

believe that he was guilty but that is not my personal opinion and I would be able to decide objectively according to the information presented as to whether I think he is guilty or not.

BY MR. GREGG:

Ms. McDonald, am I correct in stating that you think that the newspaper slanted the story?

BY MS. McDONALD:

Yes.

BY MR. GREGG:

They wrote it in such a way as to lead a reader to believe that Willie Albert Smith was guilty?

BY MS. McDONALD:

That was my interpretation of it.

BY MR. GREGG:

But, insofar as you are personally concerned, you had told me, didn't you, that you could set all that aside?

BY MS. McDONALD:

Yes.

BY MR. GREGG:

And you could decide the case with complete objectivity regardless of what you read in the newspaper. Is that right?

BY MS. McDONALD:

Yes.

BY MR. GREGG:

All right. Now, can everyone else make that statement?

(Jurors nodding)

BY THE COURT:

Sullivan to the State?

BY MR. DAVIS:

Accept.

BY THE COURT:

Sullivan to the defense?

BY MR. GREGG:

Accept.

BY THE COURT:

Sullivan will be the first alternate. We'll try for a second alternate, two challenges each. Toth?

BY MR. DAVIS:

The State would challenge Toth and Barham.

BY THE COURT:

Okay. Walker to the defense, two challenges.

BY MR. GREGG:

Accept.

BY THE COURT:

Walker will be alternate juror number 2. Bring the panels in.

BY MR. PETERS:

Before you bring them in, I would like the record to reflect that the State used all twelve of its challenges and that four jurors are now seated who stated they could not convict based on circumstantial

evidence.

BY THE COURT:

I would like for you to urge that on appeal.

BY MR. PETERS:

If I get a chance to. That's why I made the record.

BY THE COURT:

Bring them in.

(Whereupon, all prospective jurors were brought into the courtroom and the following proceedings were had:)

BY THE COURT:

As your names is called, please take your seat in the jury box as directed by the bailiffs.

Ernest Boyles

John Emerson

Vera Pleasant

Donnie Gill

James G. Brown

Larry Graves

Johnnie Brown

Richard Looper

J.H.D. Burns

Florence Burse

Gladys Oliver

Mary Henderson.

Q And your sentence for that was what?

A Twenty-five years, twenty-two suspended and three to serve.

Q Okay. Did you have any other convictions besides that?

A No, Sir.

Q Did you serve time for that offense?

A Yes, sir.

Q And where did you serve that time?

A Hinds County Penal Farm.

Q Are you presently under probation?

A Yes, sir.

Q And have you been under probation ever since your release?

A Yes, sir.

Q I am going to call your attention to the early morning hours of March the 15th of 1981. Do you remember that day?

A Yes, sir.

Q You do recall that day?

A Yes, sir.

Q That was about three months ago. Is that correct?

A Yes, sir.

Q What were you doing and who were you with at about 5:00 or 6:00 o'clock in the morning on that day, please, sir?

A About 5:00 o'clock, James Wells came by my house -- 5:00 o'clock in the morning -- and he's from McComb,

Mississippi and he was going down there and he wanted me to go with him and he had a government check that he gets every month and he wanted me to try to find somewhere that he could cash it so we went to Kroger's on Robinson Street. Well, we went there and we was coming back and we saw -- as we was coming down Robinson Street toward Ellis Avenue, this gray car pulled into this Tote-Sum store and this red Pinto was sitting there parallel to the building and, as we were coming by, the lady got out of the car, going in her purse, and then walked up to the door and this guy -- he was standing outside the Pinto with the door open and he walked from the car toward the lady at the store and she started meeting him -- started walking toward him -- going in her purse with

her head down and he walked up to her and grabbed her around the neck and started trying to drag her to the car and I was telling James to stop the car and he said that he wasn't gonna stop -- that he didn't want to get involved -- and he just kept going -- he slowed down -- he was riding his brakes but he didn't come to a complete stop but he had slowed down considerably, you know.

Q Were you on the same side of the street at this Tote-Sum store?

A Yes, sir, we were gonna pull in there.

Q Were you driving or were you a passenger in the car?

A A passenger.

Q Was the Tote-Sum store on the same side of the street as you were sitting?

A Yes, sir.

Q All right. The driver, then, would have been away from the Tote-Sum store and you were in between him and the Tote-Sum store. Is that right?

A Yes, sir.

Q Was the car in the same lane as the Tote-Sum store or was it on the inside lane toward the center lane?

A It was on the righthand lane.

Q How far, as best you can estimate, were you from this incident where a black person grabbed this lady, Mr. Thomas?

A About thirty feet.

Q That would be about ten steps?

A Yes, sir.

Q Why was it that he was slowing down? Why was he on his brakes?

A Well, see, we could see and tell that the lady was struggling and

trying to get away from him and, you know, I know how it feels if someone grabbed my mother and I was gonna try to scare him off or whatever. We would have to get out of the car and I figured the two of us -- you know, he would have got off and left or whatever.

Q Had the two of you already cashed the check or not?

A No, sir.

Q What were you doing with regard to that?

A Excuse me?

Q What were you all trying to do? Were you still trying to cash the check?

A Yes, sir.

Q And what was the purpose of the Tote-Sum store? Why did he slow down there?

A He was gonna stop there and see if she could or if she could tell him some place that would be open at that time.

Q To cash his check?

A Right.

Q So, you didn't just slow down for this incident. Is that right?

A No, we were gonna pull in there at that time, you know.

Q During the time that you were slowed down and you looked up there, what did the person that grabbed the lady -- what did he do with his two hands?

A Well, he walked up to her and he threw his arm around her neck like

this (witness demonstrating) and I couldn't see what he was doing with this hand but he had her -- I don't know if he had his hand over her mouth like this or whatever -- I couldn't see -- but, first, when he grabbed her around the neck and his hand was up here, he had bent down like that and I couldn't see it but he walked like that to his car.

Q He had her head bent down under his arm. Is that right?

A Right.

Q Okay. And you couldn't tell whether his other hand was over her mouth or not.

A No, sir.

Q But it was in that direction.

A Yes, sir.

Q What kind of car was it that she was driving -- what color car was that?

A I believe it was a gray or a light blue Ford car.

Q And what kind of car was it that the black individual was in?

A A red Pinto.

Q Did you notice anything unusual about that car or different about that car?

A Yes, sir. As we was approaching, I saw the decals in the center of the trunk and, as we was going along-side of it, he never did stop, and I saw the shape of the car. I would say it was about three and a half blocks from where we were and, since Kroger's wasn't open, I said -- I was just

thinking I would get him to go on and take me to the house or whatever and I would call the police and give them a description of the car and, as we were passing the car, I saw the dent on the grill and the carpeting on the dashboard of the car.

Q You did see carpeting on the dashboard. Is that right?

A Yes, sir.

Q What color car was that?

A It appeared to be a light gray or silver, you know.

Q That was her car.

A His.

A No, sir.

Q Okay.

A She didn't have time.

Q She did not have time to do that.

A No, sir.

Q And the last thing that you saw her doing before he grabbed her was going through her purse. Is that right?

A Yes, sir.

Q After that, did you ever talk to any police officers?

A Yes, sir.

Q How long was it after you saw this was it that you talked to the police officers and where did you see them, Mr. Thomas?

A It was about five to ten minutes. We kept going and crossed Ellis Avenue going toward Provine. When

we got there to the red light at the corner of Claiborne and Robinson, we made a left going up towards A & P on Capitol Street to see if they were open and, when we went up there and they wasn't, we came back down Ellis and we saw the police car sitting over there at the store so we stopped over there and asked him what happened.

Q And you determined that somebody had been taken away from there?

A Well, at the time, he didn't know. He asked us what we was talking about and we told him that a guy grabbed the lady and we showed him where she was at the door and stuff and then we started looking around and we saw this stuff

Q And did you come here yesterday under that subpoena?

A Yes, sir.

Q Were you shown a lineup of photographs at that time?

A Yes, sir.

Q Were you given time to view those photographs as long as you wanted?

A Yes, sir.

Q And what were you told when you viewed those photographs?

A To see if I could pick out the guy that I saw that day.

Q When you went to the lineup, did they place you under any kind of oath?

A (Pause).

Q Did they swear you in?

A No, sir.

Q Do you realize that you are under oath today, please, sir?

A Yes, sir.

Q Are you on probation today?

A Yes, sir.

Q Are you aware of what could happen if you lie under oath?

A Yes, sir.

Q Not only the penalty for perjury but with regard to --

A (Interposing) The twenty-two years.

Q You would have to serve twenty-two more years for violating your probation. Is that right?

A Yes, sir.

Q When you were shown this group of photographs yesterday, were you able to identify any particular individual?

A Yes, sir.

Q Did you pick this defendant out at that time?

A Yes, sir.

Q And how many photographs were you shown at that time?

A Five.

Q Did any of them look similar to this defendant over here?

A (Pause).

Q Look something like him?

A Yes, sir.

Q Were all of them black males?

A Yes, sir.

Q Of the approximate same age?

A Yes, sir.

Q Are you able today to pick out the person in this courtroom that you saw out there that morning?

A Yes, sir.

Q Would you point him out for the Court and jury, please?

A That's him sitting over there.

Q Which one of the three people sitting at the table?

A In the middle.

Q Okay.

BY MR. PETERS:

May it please the Court, we would like for the record to reflect that he's identified the defendant in this case.

BY THE COURT:

The record may so reflect.

BY MR. PETERS:

Q Is there any doubt in your mind that that's the person you saw abducting that woman on that day?

A No, sir.

Q Okay.

BY MR. PETERS:

Excuse me for just a moment, Your Honor.

BY THE COURT:

Okay.

(Off the record)

BY MR. PETERS:

Q I'll have to back up. There's something I forgot to ask you. Where was this store where you saw this happen?

A The Tote-Sum store across from Westland Plaza.

Q Here in Jackson, Mississippi?

A Yes, sir.

Q Out on Robinson Road?

A Yes, sir.

Q And you talked to two other people. Is that right?

A Yes, sir.

Q Do you see either of those people other than the District Attorney in this courtroom?

A Yes, sir.

Q Which one is that?

A Lieutenant Bartlett -- and I believe it was him but the other guy that was in there kept his head down. He was writing or doing something.

Q Was it this gentleman right here (Mr. Gregg pointing)?

A Yes, sir.

Q He is one that talked to you along with Mr. Peters?

A Yes, sir.

Q And one other person?

A Yes, sir.

Q All right.

A He's the one that handed me the pictures, you know.

Q Handed you the pictures?

A Right.

Q Do you know this gentleman's name? Say it again.

A Lieutenant Bartlett.

Q Bartlett?

A I believe that's it.

A Me and him -- I had a check that I was trying to get cashed and me and him was riding -- I was fixing to go down to my mama's house and me and him was riding around until something opened up so we could get the check cashed.

Q Now, you said your mother's house. Where does she live?

A McComb.

Q McComb, Mississippi?

A That's correct.

Q While you were riding around with Kenneth Thomas, did anything unusual happen?

A Yes, it did.

Q And when was that?

A It was about 5:15 on the morning of the 15th which was a Sunday morning.

Q And where was that?

A At the Tote-Sum store on Ellis.

Q Okay, sir. Is that the one on Robinson right across from Westland Plaza?

A That's right.

Q And what did you see when you got to the Tote-sum store?

A We saw a little red car drive up with a black male -- which a black male was driving it -- and the other lady that runs the Tote-Sum store -- she drove up -- and the black male got out from the little red car and the lady got out of her car and he said something to the lady and he started walking toward her and she started coming toward him and she was looking in her purse like she was looking for some change or

something and his arm reached over and he grabbed her and started choking her and, at that time, me and Kenneth -- we kept on driving.

Q Now, whose car were you in?

A In my car.

Q Was Kenneth in the car with you?

A That's right.

Q Now, in which direction were you going at that time?

A We was going down Robinson toward Provine. We went down and turned on Claiborne and went up to West Capital and down by the A & P store and that's when we decided should we come back, you know, to the Tote-Sum store and we turned around at the A & P and came back to the Tote-Sum store and that's when

the police officer was sitting on the lot -- the parking lot of the Tote-Sum store -- and that's when we entered the lot.

Q Okay, sir. Now, when you passed by the first time and saw this little red car and the other car, how far away from the two people were you?

A I would say approximately ten feet or something like that.

Q Now, were you planning to make any stops in that area?

A No, I wasn't.

Q How fast were you going when you passed by the Tote-Sum?

A I don't recall.

Q How long a period of time did you look at what was going on in the parking lot of the Tote-Sum store, please, sir?

A Approximately ten or fifteen seconds or something like that.

Q During that ten to fifteen seconds, did anything get in your way to stop you from looking at what was going on?

A No, it didn't.

Q Now, was it daylight, dark, dawn or what was it?

A It was dark.

Q Was it so dark you couldn't see?

A No, it wasn't.

Q Did you get a good look at the woman that was out there?

A No, I didn't get a good look at the lady.

Q Did you get a good look at the car?

A Yes, I did.

Q Did you get a good look at the black man?

A I think I got a pretty good look at him, yes, sir.

Q Now, how long was it after you had seen this going on that you came back to the Tote-Sum store?

A Approximately twenty -- twenty to twenty-five minutes.

Q And, when you got back to the Tote-Sum store, what did you find there?

A Well, we found a police officer sitting on the lot in his car and there was a bill laying down in the parking lot.

Q There was a what?

A It was a greenback -- a bill -- I don't know what it were, you know.

Q Some money?

A Right.

Q And you don't know what denomination of money it was?

A No, I sure don't.

Q Did you see anything else?

A No, I didn't.

Q Now, did you go up and talk to the police officer yourself?

A That's right.

Q Did Kenneth Thomas go up and talk to the police officer?

A That's correct.

Q Did the both of you tell the police officer what you had seen?

A Correct.

Q Now, describe the little red car that you saw out there as best you can.

A I think the front grill -- a piece of the front grill was out of it -- and there was some carpet on the dash of it.

Q If you were to see that car again, do you think you could identify it?

Q If you were to see the man again that you saw on the parking lot of the Tote-Sum store, do you think you would be able to identify him?

A I think so.

Q I'll ask you to look around the court room and see if you see the man that you saw at the Tote-Sum store that morning?

A (Witness looking around) I would say that's him over there.

Q Which man are you indicating?

A With the blue uniform on.

Q Okay.

BY MR. DAVIS:

Your Honor, would you let the record reflect that he has identified the defendant in this case?

BY THE COURT:

It may so reflect.

BY MR. DAVIS:

I have nothing further, Your Honor.

BY THE COURT:

Mr. Gregg?

CROSS EXAMINATION

BY MR. GREGG:

Q Mr. Wells, this is the first time you have ever identified this man to anybody, isn't it?

A Yes, sir.

A After it happened, we di . . . [illegible in original] . . .was back in March.

Q All right.

A And we haven't discussed it since.

Q And you told Mr. Thomas that you couldn't identify the man, didn't you?

A Yes, I did.

Q You told him that, didn't you?

A Yes I did.

Q And you couldn't identify him at that time, could you?

A No, sir, I couldn't.

Q But you did this morning.

A That's right.

Q For the first time.

A That's correct.

Q Has anyone visited you and talked with you at your residence, Mr. Wells, representing the defendant, stating that they were trying to help the defendant?

A Correct.

Q Would that have been about July the 14th, Mr. Wells?

A I believe so.

Q This man over here (Mr. Gregg pointing), do you recognize him?

A I do.

Q You have seen him before.

A That's correct.

Q He came to your house.

A That's correct.

Q And did he come with two black women?

A Correct.

Q Did they tell you that they were the sisters of the defendant?

A Correct.

Q And they took down notes while they were talking to you, didn't they?

A I suppose so. I am not for sure.

Q And you told them at that time that you couldn't identify the black man, didn't you?

A Correct.

Q And you couldn't identify him then, could you, Mr. Wells?

A Not at the time, I couldn't.

Q What has happened, sir, to refresh your memory on that?

A Well, they showed me some pictures of him yesterday morning and that's when I identified him.

Q And you identified this morning the man you saw in the pictures.

A That's correct.

Q And they told you that that was the man that was out at the Tote-Sum, didn't they?

A No, sir, they didn't.

Q All right. They told you who he was -- who this man was that you -- this picture you saw?

A After I identified him, yes.

A That's correct.

Q You saw a black man attacking. . . .[illegible in original]. . .didn't you?

A That's correct.

Q You saw a black man attacking a white woman who you couldn't identify until this morning.

A That's correct.

Q All right.

A Yesterday morning really.

Q You identified him yesterday morning?

A Yes, sir.

Q How did you identify him yesterday morning?

A On a picture.

Q On a picture.

A That's correct.

Q All right. A picture that somebody put in front of you.

A Yes, sir.

Q Did you see him in court yesterday morning, please, sir?

A I wasn't in court yesterday morning.

Q You weren't in court yesterday morning?

A No, sir.

Q Was Mr. Thomas present at the time you identified the picture yesterday?

A No, sir, he wasn't.

Q Who all was present?

A Just me and the guy sitting back there, the Lieutenant.

Q This gentleman sitting right here (Mr. Gregg pointing)?

A That's correct.

Q Just the two of you?

A That's correct.

Q Nobody else.

A No, sir.

Q And you told us, did you not, that you had the defendant, the car, the woman and her car and you told us you had them under observation for about ten or fifteen seconds, didn't you?

A That's correct.

Q That's what you told us.

A That's correct.

Q All right. Describe the woman.

A Which woman? I don't understand the question, sir.

Q The lady that was in front of the Tote-Sum that the black man was grabbing.

A She was about, I would say, in her forties and had sort of brownish or grayish looking hair.

Q What else?

A (Pause).

Q Weight?

A I am not sure.

Q How tall was the man?

A About five eight or five nine.

Q Five eight or five nine.

A That's correct.

A That's correct.

Q And you couldn't identify him when Mr. Jamison Gregg and the defendant's two sisters came to see you, could you?

A Correct.

Q You couldn't identify him then.

A That's correct.

Q Mr. Wells, on your oath, tell us whether or not you can identify him this morning or tell us whether or not you are identifying a picture?

A I don't understand the question.

Q Are you identifying the defendant -- this man -- as the man who was out at the Tote-Sum store or are you identifying a picture?

A I'm identifying the man.

Q You are identifying the man.

A Correct.

Q For the very first time.

A That's correct.

Q Which way on Robinson Road were you travelling at the time?

A Down Provine way.

Q You were going which way?

A Down towards Provine.

Q Were you coming in this direction -- toward town?

A That's correct.

Q All right. And which way was the Pinto automobile parked?

REDIRECT EXAMINATION

BY MR. DAVIS:

Q When was the first time that you had an opportunity to identify the man who you saw out there at the Tote-Sum store?

A Well, really it was yesterday because, when they had the matter, I didn't have to come.

Q You didn't go see a lineup at the Police Department, did you?

A No, sir.

Q Hadn't nobody given you a group of pictures and asked you if you could identify the man that you saw.

A No, sir.

Q So, yesterday was the first time that had happened, wasn't it?

A That's correct.

Q Now, how many pictures did you look at day?

A I think it was about four or five -- so in that neighborhood.

Q And you saw the man that you saw out there at the Tote-Sum store.

A That's correct.

Q Now, tell us how it happened that you saw the photographs.

A Yesterday morning, I was in his office and he brought some photographs and he asked me could I identify the man and I told him I wasn't for sure so he said he had some photographs that he wanted me to look at so he brought me

about four or five photographs and, at that point, I narrowed them down to about three and that's when I identified the man, you know.

Q Okay. Now, did he tell you which picture to identify?

A No, he didn't.

Q Did he tell you which one he thought was the suspect?

A No, he didn't.

Q Did he point any picture out to you?

A No, he didn't.

Q So you picked the picture out on your own. Is that right?

A That's correct.

Q Okay.

A He left out of the room.

Q He left out of the room?

A That's correct.

Q And you had it picked when he got back. Is that right?

A That's correct.

Q Now, how many times since that morning have you seen this defendant in person?

A I don't understand your question.

Q How many times have you seen the man that you have identified before today?

A That's the first time -- the night of the accident.

until 7:00 o'clock on the morning of the 15th?

A Correct.

Q Now, sometime around 5:30 on the morning of the 15th, did you have an occasion to be at the Tote-Sum store located on Robinson Road?

A Yes, sir.

Q And is that the store located in the vicinity of Westland Plaza?

A Yes, sir, it is.

Q Do you know that location to be wholly located within the First Judicial District of Hinds County, State of Mississippi?

A Yes, sir.

Q About what time did you get to that Tote-Sum store?

A It was approximately 5:30 or 5:35.

Q Okay, sir.

BY MR. DAVIS:

Court's indulgence for just a minute while he brings this in.

BY THE COURT:

Okay.

(Off the record while board is being brought into the courtroom).

BY MR. DAVIS:

Q Now, Sergeant Otis, after you had gotten to the Tote-Sum store, did you have an occasion to come into contact with a Kenneth Thomas and a James Wells?

BY MR. GREGG:

I object to the leading question, Your Honor.

BY THE COURT:

Overruled.

BY MR. DAVIS:

Q Go ahead.

A Yes, I did.

Q And where did you come into contact with them, please sir?

A At the front of the store in the parking lot area.

Q Okay, sir. And what began the contact between the three of you?

A Well, they approached me first of all and asked me if anything unusual had happened.

Q At that time, were you aware of anything unusual happening?

A Not at that particular time, no.

Q Now, what was told to you by them that caused you to take further action that morning?

BY MR. GREGG:

I object to any hearsay, Your Honor.

BY THE COURT:

Well, it's not admitted for the purpose of the truth. It's admitted merely to show that the statement was made.

A No, sir. She was nowhere to be found on the premises.

Q Okay, sir. Now, did you ever have an occasion to observe a vehicle that fit the description as the one given to you as being on the Tote-Sum store parking lot?

A Yes, sir.

Q And when was that?

A While waiting for the area supervisor to return with the keys to the store, I observed a red Pinto fitting the description of the one given to me by the two witnesses that morning.

Q Where did you observe that?

A I observed it coming towards me which meant that the vehicle was travelling East on Robinson Road.

The vehicle turned around at the Red Arrow Car Wash which is approximately three hundred yards from where I was located, you know.

Q Okay, sir. Did you, at that time, follow the vehicle?

A I did not pursue the vehicle until it was quite obvious that the car turned around to avoid me or avoid me seeing it.

Q Okay.

A That's when I pursued the vehicle.

Q And did you ever stop that vehicle, Sergeant Otis?

A Yes, I stopped the vehicle at Glenwood and Robinson Road to check it out because, as I approached the vehicle, I observed the decals in the rear of it and I felt

that I had probable cause enough to check the vehicle out, you know.

Q Okay, sir. Now, when you stopped the vehicle, you have already testified that you saw the decals or stickers on the back of the car?

A Yes, sir.

Q What other characteristics of the car did you observe that led you to believe that it possibly could be the car you were looking for?

A Well, it was red in color and it was a 1971 Ford Pinto as given to me by the witnesses. It also had a light color carpeting or material in the front windshield of the car.

Q Tell the jury whether or not the automobile had any damage to it.

A It was damaged in the front.

Q Had you been told that by the witnesses, Sergeant Otis?

A Yes. The witness did state that it possibly had damage to the front.

Q Okay, sir. Now, how long after you had arrived at the Tote-Sum store was it that you stopped that vehicle, please, sir?

A It was approximately forty-five or fifty minutes after I arrived at the store that I stopped the vehicle, sir.

Q Okay, sir. Did you identify the driver of that vehicle?

A Yes, the driver of the vehicle was found to be Willie Albert Smith.

Q Is he present in the courtroom today?

A Yes, sir, he is.

Q And would you point him out?

A He's the gentleman sitting over there at the table -- the black subject with the blue jumpsuit on.

Q Okay.

BY MR. DAVIS:

Your Honor, would you let the reflect that he has identified the defendant in this case?

BY THE COURT:

The record may so reflect.

BY MR. DAVIS:

Q Now, when you stopped this defendant, did you look in the interior compartment of the car?

A Only briefly, sir, did I look into the interior of the car because, as I pulled the subject down, I observed him to reach over to his right and do something which I have found in my past experience in most cases to be a weapon. Generally, when people see a police officer stopping them, they will scoot a weapon under their seats so, from past experience, I was under the impression that he was sliding a weapon under the right side of the seat and I walked around and looked into the vehicle to see what he was placing under the right side of the seat.

Q What did you find that to be?

A I found it to be a female's shoe precisely as to the one I found at the crime scene at the store -- the Tote-Sum store.

Q I hand you another item that has been marked as State's Exhibit #1 at a prior hearing and ask you if you recognize it?

A Yes, sir, this is the female's shoe that was found on the right side passenger seat of the red Ford Pinto car.

Q Okay.

BY MR. DAVIS:

Your Honor, we offer this as an exhibit.

BY MR. GREGG:

We object to its introduction for the reason previously stated

in Defendant's Motion to Suppress and we renew that motion.

BY THE COURT:

Motion denied. It may be admitted into evidence.

(Whereupon, the above mentioned shoe was marked as State's Exhibit #8 to the testimony of Mr. G. E. Otis and is made a part of the record in this cause, which exhibit may be found separate and apart from this transcript.)

BY MR. DAVIS:

Q Now, what has been marked as State's Exhibit

#8 you said to be the shoe that you found in the automobile driven by this defendant. Is that correct?

A Yes, sir.

Q Now, were there any other occupants in that car when you stopped it?

A No, sir.

Q At the time that you stopped that automobile, did you know the whereabouts of Mrs. Roberts?

A No, sir.

Q Had you been able to determine anything regarding her welfare?

A Regarding her what?

Q Her welfare.

A No, sir.

Q After stopping the automobile and discovering the shoe

which you have previously identified, was the defendant placed in custody?

A Yes, sir, he was placed in custody.

Q Now, did you determine whether or not the automobile, that being the red Pinto, was owned by this defendant over here?

A We discovered at that time that the driver, Willie Albert Smith, did not own the vehicle according to his statements.

Q Okay, sir. Now, did you discover who the owner of the automobile was?

A Yes, sir.

Q And who was that?

A Of course, the Crime Lab eventually came to the scene.

Q Okay, sir. Do you know whether or not a body was ever discovered?

A Yes, sir.

Q Do you know where it was discovered, Sergeant Otis?

A Yes, sir.

Q And where was that?

A In the rear of 109 Keystone Court.

Q Do you know when it was discovered?

A It was discovered at approximately 07:12 hours or twelve minutes after 7:00.

Q Twelve minutes after 7:00?

A Yes.

Q In the morning?

A Right.

Q And that would have been the morning of March 15, 1981?

A Correct.

Q Less than two hours after you had first discovered something was wrong at the Tote-Sum store. Is that correct?

A Correct, sir.

Q Now, how long was it that you said that you stopped the car after you had arrived at the Tote-Sum store Sergeant Otis?

A It was approximately forty-five to fifty minutes.

is?

A Yes, sir.

Q Would you mark that, please?

A (Witness doing so).

Q If you would, just put Wallace out beside that and initial it also.

A (Witness doing so).

Q And I'll ask you to indicate on that map the location of the University Medical Center.

A (Witness doing so).

Q And, if you would, just put UMC out beside that.

A (Witness doing so)

Q And your initials.

A (Witness doing so).

Q Okay, sir, thank you. If you would, return to the witness stand.

A (Witness sitting back down).

Q Now, have you conducted an investigation to determine the distance between the Tote-Sum store located on Robinson Street and 109 Keystone Court?

A. Yes, I have.

Q And what is that distance?

A Approximately 2.9 miles.

Q 2.9 miles.

A Yes, sir.

Q When did you examine that distance, Sergeant Otis?

A I examined the distance early in the morning before daylight.

Q But he didn't make any admissions or denials -- that was my question.

A No, sir, not to me.

Q All right. Now, when you arrested him, he voluntarily directed you to Mr. McDonald's house, didn't he, Sergeant?

A He certainly did.

Q And, also, he was in your patrol car and you went to his residence over on Keystone Court. Is that not correct?

A Yes, sir.

Q And did he voluntarily direct you to his home, please, sir?

A No, sir.

Q Well, did he refuse to direct you to his residence?

A I don't recall ever asking him.

Q So, you don't know whether he would have taken you to the residence or not.

A No.

Q But he took you immediately to Mr. McDonald's residence and then Mr. McDonald directed you over to his residence.

A Correct.

Q Other than being upset, did he offer any resistance whatever when you arrested him?

A (Pause).

Q He didn't strike you, did he?

A No, sir.

there?

A No, sir, that's the Mobile Crime Lab -- the evidence technicians job.

Q All right. To your knowledge, has the Jackson Police Department conducted any investigation to the possibility that someone else might have killed Mrs. Shirley Roberts, please, sir?

A Not to my knowledge.

Q When did you first observe the suspect coming down Robinson Road?

A (Pause).

Q What was he doing? That's what I am trying to find out.

A He was driving this vehicle -- this red 1971 Ford Pinto.

Q At a high rate of speed?

A He was travelling East on Robinson. I wouldn't say he was travelling at a high rate of speed. Thirty-five or forty miles an hour perhaps.

Q And he made a turnaround at the Red Arrow Car Wash?

A Yes, sir.

Q Did you conduct a search of the area where he turned around at the Red Arrow Car Wash?

A I certainly did.

Q Did you discover anything?

A At the time you conducted the search, where was the defendant?

the vaginal area of the victim and I am asking the Court for some guidance on whether or not the Court wishes for me to bring that out or desires for me not to bring it out.

BY THE COURT:

Well, do you have any evidence or testimony that the semen can be related back to this defendant?

BY MR. PETERS:

Your Honor, I believe that the report said that he was a non-secretor and that they could not but, before I

misrepresent that, I want to make sure before I tell the Court.

BY THE COURT:

Okay.

(Off the record)

BY MR. PETERS:

Yes, sir, that's right. Serological tests on a portion of the fluid which were sperm cells from the victim failed to show the presence of any secretor substance. Oral swabs represented having been collected from the complainant were tested serologically and no secretor substances were detected and blood

Dr. Galvez - Direct - 529

samples represented
having been from the
victim was found to be

type O. This is not to say whether or not this defendant is a secretor or not, Your Honor. So the answer is that no there is no way to positively tie it between the two. Only that there were sperm cells present in the vaginal area of the victim.

BY THE COURT:

Well, I can't see how that would be of any help as far as proving identification and that would be the only purpose that you could offer it for, Mr. Peters.

BY MR. PETERS:

All right, sir.

BY THE COURT:

Instruct your witnesses to be cautious.

BY MR. PETERS:

Yes, sir. Dr. Galvez, you know not to mention the vaginal swabs at this time.

BY THE WITNESS:

Yes, sir.

BY MR. PETERS:

Thank you, Your Honor.

BY THE COURT:

Bring the jury back.

Q So you couldn't run it over, say, forty or forty-five miles an hour, could you?

A Yes, you could. Once you get it and hold it down, it would go on down.

Q But it was in real rough shape.

A Yes, sir.

Q And you drove it slowly, didn't you?

A Sometimes.

Q Most of the time. Right?

A Yes, sir.

Q Did you tell Willie Albert Smith to drive it slow?

A I didn't tell him how to drive.

Q But he knew to drive it slow, didn't he, please, sir?

A I assume that he did.

Q All right. You made a point out of him not having any money?

A Yes, sir.

Q You don't know that for a fact, do you, Mr. McDonald?

A I only -- you know, I didn't go in his pockets. I don't know if he had any or not. He didn't show me none, you know.

Q You don't know what he had in his pockets, do you?

A No, sir.

Q So, you don't know whether he had money or not, do you?

evidence is two eye witnesses. Now, don't believe them so I can have another trial. If we were sandbagging him, as he says, why didn't he make a motion to the Court? Your Honor, I didn't know they were gonna say this. Can I let these witnesses go out of the courtroom and come back in here? No. Instead of us getting to cross examine them, he comes up here and says, if they had taken the stand, they would have said it was a lie. And, so, nobody gets to cross examine that. Now, whose trick is that? And, after it happened once, what did he do? Did he tell these people to get out of here, it looks like these folks are gonna identify you? No. He left them in here again.

And Mr. Wells came in here and he identified him. He said he didn't think he could and I didn't think he could and I didn't think Thomas could when we started this trial because all I asked you about was circumstantial, circumstantial, circumstantial. I didn't think either one of them were gonna identify him. But, when they got here, they were given what we call a showup, five pictures, and both of them picked him out. And did you hear what Wells said? Do you know how we threatened Wells? I was up here picking a jury and my investigator was busy getting ready for trial, wasn't even in the room, and he came back and said: "Here's the man". Now, that's how we threatened him.

That's one of the people he wants to get at the wickedness of. Innuendos. Personalities. Doesn't have one thing to do with this trial. You are dealing in facts. He's not. Did he mention how his client's pubic hair got in this

IN THE CIRCUIT COURT OF THE FIRST
JUDICIAL DISTRICT
OF HINDS COUNTY, MISSISSIPPI

STATE OF MISSISSIPPI

VS. NO. S-942

WILLIE ALBERT SMITH

JURY INSTRUCTION NO._____

You have found the Defendant guilty of the crime of "Capital Murder". You must now decide whether the Defendant will be sentenced to death or to life imprisonment. In reaching you decision, you must objectively consider the detailed circumstances of the offense for which the defendant was convicted, and the Defendant Willie Albert Smith himself.

To return the death penalty, you must unanimously find from the evidence beyond a reasonable doubt that aggravating circumstances - those which tend to justify the death penalty - outweigh mitigating circumstances - those which tend to justify the penalty of life imprisonment.

If you unanimously find from the evidence in this case, beyond a reasonable doubt, the following aggravating circumstances: if

1. The Captial murder was committed while the defendant, was engaged in the commission of robbery;

2. The capital murder was committed for pecuniary gain;

3. The capital murder was especially heinous, atrocious or cruel; then you must proceed to weigh the aggravating circumstances and the

mitigating circumstances, one against the other, to determine whether the aggravating circumstances, if any, outweigh the mitigating circumstances.

The mitigating circumstances which may consider include the following:

1. The defendant has no significant history of criminal activity.

2. The age of the defendant at the time of the crime.

3. Any and all other matters, facts and circumstance which you as jurors may consider from the evidence as mitigating.

4. Any circumstance or combination of circumstances surrounding the defendant's life and character which reasonably mitigates against impositon of the death penalty.

5. Any circumstance or combination of circumstances surrounding the offense which reasonably mitigates against impositon of the death penalty.

If you unanimously find from the evidence, beyond a reasonable doubt any or more of the aggravating circumstances listed above, and, if, after weighing the mitigating circumstances [and] the aggravating circumstances, one against the other, you further find unanimously from the evidence beyond a reasonable doubt that the aggravating circumstances out-weigh the mitigating circumstances and that the death penalty should be imposed, your verdict shall be written on a separate sheet of paper, shall be signed by your foreman, and shall be in the following form:

"We, the Jury find unanimously and beyond a doubt the following aggravating

circumstances; (list the aggravating circumstances, if any, which you unanimously find beyond a reasonable doubt from those listed above in the same language as they are listed.) We, the Jury, further find unanimously from the evidence and beyond a reasonable douct that after weighing the mitigating circumstances and the aggravating circumstances, one against the other, that the aggravating circumstances do out-weigh the mitigating circumstances and that the defendant should suffer the penalty of death.

_____

Foreman of the Jury

If you fail to find any aggravating circumstances unanimously and beyond a reasonable doubt, or, if you find unanimously one or more aggravating circumstances and beyond a reasonable

doubt, but after weighing the mitigating circusmstances, one against the other, you fail to unanimously find beyond a reasonable doubt that the aggravating circumstances out weigh the mitigating circumstances, then you verdict shall be in the following form:

"We, the Jury, find that the defendant should be sentenced to imprisonment for life in the state penitentiary."

If, after reasonable deliberation, you cannot agree as to the punishment, you should certify your disagreement to the Court and the Court shall, under the law, impose a sentence of imprisonment for life. Your verdict shall be in the following form:

"We, the Jury, after due deliberation, have been unable to agree upon the punishment and hereby so

certify and request the Court to dismiss the Jury from further deliberation."

APPENDIX F

Cowling, uh, on this particular occasion I was to gather some information on, uh, an abduction that Mr. Wells had allegedly seen and so, uh, I went to his home to gather some information.

Q. And did you know the name of the case or the name of the person charged with that crime?

A. Yes.

Q. What was that name?

A. Willie Albert Smith.

Q. Now, when you went to James Wells' home, did you actually meet with him?

A. Yes, I did.

Q. Was there anyone else present?

A. No.

Q. Did you have a conversation with him at that time?

A. Yes, I did.

Q. And was the subject of the conve[rsation] this abduction in the Smith case?

A. Yes.

Q. And would you tell us to the best of [your] recollection what Wells said to you and what you [said] to him at that time?

A. Well, uh, at that time after we had talked and got reacquainted, uh, I told him the last time that I had really talked to him or seen him was after he had, uh, witnessed this particular crime or whatever and I asked him what did he see or what--what

had happened. And he related to me that he and another gentleman were

driving down Robinson Road at 5:00 o'clock in the morning and he was looking to cash a check. And they passed the Stop 'N Go and they decided that they would stop there to see if they would cash the check, but they looked over at the Stop 'N Go and they saw a young lady unlocking the door. Then they noticed a red Pinto pull up in the parking lot and a black gentleman got out of the car and grabbed the young lady and they began struggling. And he told me that the gentleman pulled the lady into the car and about that time, he said he had completely passed by the Stop 'N Go. And so I asked him, "Well, what--what all did you see? How did he look?" And he told me he really

couldn't see the guy's face and all that he saw was the struggle actually. And I asked him did--did he have to go to court on the case and he told me he did. And I asked him, "Well, if you actually didn't see anything, what could you testify to?" And he told me that before he went to court, the police had questioned him and that he told them, you know, he actually didn't see anything but the struggle and he couldn't identify anybody and he told me that the police said that they would arrest him for withholding evidence if he didn't come forth with the truth. And he told me that he was telling the truth and he actually didn't see anybody and he said they placed pictures in front of him and asked him to identify

the man that abducted the young lady. And he said at that time that he couldn't identify anybody. And so the conversation went on and as I recall, uh, uh, uh, I asked Mr. Wells, uh, "Well, what did you testify

to? How could you identify the gentleman?" He said well, when he got into court, the man accused of the crime was wearing a blue jumpsuit, or something of that nature, I think, detention inmates or whatever wear this suit, and he said that's how he was able to point out the person accused of the crime.

Q. Is there anything else that you can recall now that Wells told you back on October 20th, 1983?

A. Well, he said the guy riding with him saw more than he did and James Wells told me he was intoxicated at the time, you know, that he was passing by the Stop 'N Go and he informed me that, you know, he made his statements and his testimony in court

because he had been sorta coerced into making those statements.

Q. Now, at the time that you spoke with James Wells on October the 20th, did you record what he was saying?

A. Yes, I did.

Q. Now, was he aware that you were recording it?

A. No, he wasn't.

Q. Was he aware that you were acting on behalf of Cowling Investigations at that time?

A. No, he didn't.

BY MR. KENNEY: May I have these exhibits marked, Your Honor?

BY THE COURT: Yes.

(SAME WERE TENDERED AND MARKED AS EXHIBITS 2, 3 AND

3A, FOR IDENTIFICATION ONLY,
EXHIBITS 2 AND 3A BEING
ATTACHED HERETO AND

a black male pulled up in a red Pinto; jumped out of the car and grabbed the lady and they began wrestling and he began hitting her. And he further stated that he was informed that they had pulled--that the guy pulled the lady into the car and about that time, they were out of range. And he said they turned back--the other person in the car said, "Turn around. We should help her." And so they turned back around and the Pinto and the young lady was gone. And, uh, so, uh, Mr. Thomas told me, that, uh, the police, uh--I mean, he told me that Mr. Wells said, uh, they returned to the store later that morning, uh, and there was a policeman talking on the pay phone there and they approached the policeman and asked him

what had happened and the policeman said, "Well, what do you mean what's happened? What--what do you mean?" And so they explained to him that they had just seen--they had seen an abduction a few hours earlier and so the policeman got their statements on the spot and, you know, took them to police headquarters. And uh, uh, finally he said as things, you know, went on, they called James Wells to court and the other person to testify against uh, uh, Willie Albert Smith. And, uh, Mr. Thomas told me at that particular time, they--the police officers took him into a--took James Wells into, uh, another room, a room and that they allowed him, Mr. Thomas himself, you know, who was--he said he was just a friend at the

time, to stand there with Mr. Wells and they gave Mr. Wells about five pictures to pick out the person he had seen abduct the young lady. And he said at first Mr.

Wells picked out a picture and that someone came in and said, "That's not right. That--that's not right." And he said, "The guy you looking for", he said one of the police officers said, "The guy you're looking for name is Willie Albert Smith." And on each one of the five pictures--Mr. Thomas said he just happened to turn the picture over--they had the names corresponding with the faces. And, uh, he said, uh, "Well, if they're looking for Willie Albert Smith, this picture has his name on the back of it and so this must be him." So the police officers came back in and they said, "Well"--well, he said Mr. Wells said that this must be the guy you're looking for if you're looking for Willie Albert Smith. And so, uh, it went on,

you know, that way. Uh, he, uh, acted as if he was just, you know, a friend of James Wells in the police station, uh, but that he actually had, you know, no part in the scene where it had occurred. And, uh, uh, he told me that, uh, the police officers had said something about, uh, uh, prior to him picking out the picture if he didn't cooperate that they would arrest him for withholding evidence and that--

BY MR. BOYD: Your Honor, now we're going to object. Now, who are we talking about? Are we talking about Wells or are we talking about Thomas or who? Or are we talking about something that Thomas said to

Wells and if that's so, then we object to it.

Q. Could you tell us who was saying this to

he goes on further: "And you--and, uh, you know, a little red car pulled up. The little lady, she was just coming to open the store, man. It was 4:30 in the morning. I was trying to get a check cashed." You stating: "A little dark, huh?" "Well, yeah, it was 4:30 in the morning man. This was a little bitty red Pinto (inaudible). The man laid there for a little; then she got up (inaudible) walking towards the store, man, to unlock the store, you know. She had a purse and this dude driving the little bitty red car went on the (inaudible) and (inaudible) to her, man. I didn't know exactly what the deal was, you know, but anyway, I saw it. He had the lady by the arm and then he started choking her and shit and taking her

towards his car and shit, you know." You asked the question: "Was she hollering and stuff?" And Wells said, "No, he had his hand over her mouth and I didn't know that he had put--and I didn't know that he had put her in the car, man, 'cause, shit, I got scared, you know, and I was driving, too, you know." Is that an accurate recollection of--of the conversation you had with Mr. Wells on that day?

A. Yes, as far as I can ascertain. Um-hmm.

Q. Now, on November the 11th, 1983, you were present during an interview by Allen Cowling of James Wells, is that not correct?

A. Thats' correct.

Q. And that transcript has not been introduced here yet today, has it?

A. I don't think so.

AC: Was it dark outside?

JW: Yes, it was.

AC: O.K. Uh, were you having to use your headlights?

JW: Yes, I was.

AC: O.K. And, had you been to sleep at all that night?

JW: No, I hadn't.

AC: Do you remember about how much you had to drink?

JW: Not exactly. Well, always when I drink, I just drink. I don't remember.....you know, I just don't have a limit....I just drink, drink, until I just fall asleep somewhere or fall out

AC: O.K. Were you sleepy that morning? Did you drink that much?

JW: Uh, I had drunk a good bit. Uh, at that point, I wasn't too sleepy at that point. But afterwards I fell asleep, and I had to let some-else drive.

AC: O.K. Now, what time did you leave all your friends?

JW: Uh, must have been some point around about 4:00, about 3:30 or 4:00, cause that's when I stopped by where I used to live at, by the guy's house I used to rent from.

AC: And, that's when you got your check?

JW: Right.

AC: O.K. What made you go to Kenneth?

JW. I don't know. I guess I thought well Kenneth, he knows a lot of peoples around here; and, I figured

that he may knew somebody that you know, would cash my check at that time of morning. And, I guess just out of curiosity, I just went by his house, I guess.

AC: O.K. Now, when you got to his house...where was his house located? Do you remember the address?

JW: His house, let's see, I don't remember exactly the address, but it's on, uh ruh, Wingfield Circle.

AC: Wingfield Circle. Does he live there by himself?

JW: Uh, his mother was living there with him at that point.

AC: O.K. When you pulled up to the house, where did you park--the driveway or the street?

JW: The street.

AC: O.K. And, did you cut your car off and go to the door?

JW: No, uh I pulled up on the side of the curb, and I was about fixing to blow my horn. And, before I did that, Kenneth Thomas, I guess he saw me outside, and he was coming out the door. And he came out the door.

AC: Were there any lights on in the house that you remember?

JW: No, it wasn't.

AC: O.K., no lights?

JW: No.

Exhibit 5 - ID Only (8)
Walker - Cross 151.

AC: He walked to the door with you?

JW: Yeah, he walked to the door with me. But, he never tried to open the door or anything. He....

AC: Were you in front of him?

JW: He was in front of me. I was kinda walking behind him.

AC: Alright, you were behind him, and he walked up to the door but didn't try it.

JW: No.

AC: Do you know why?

JW: No, I don't. He turned around and looked over at the policeman. And, I pushed on the door of the store. I was trying to go into the store, and that's when I found the store was locked. Then I peeped through the door, and I said, "This store

closed, because it's not anybody in there", you know.

AC: O.K. So, you determined that it was closed because you didn't see anybody, not because the lights weren't lit.

JW: Right. Cause I didn't see anyone, and the door was locked.

AC: Alright, at that time when you were trying that door to that Tote-Sum store, did you have any idea that anything had happened in that parking lot?

JW: No, I didn't.

AC: Had Kenneth Thomas, at that time, told you anything to indicate he seen anything?

JW: No, he didn't.

AC: O.K. Now, you've tried the door and it's locked. Then, what did both of ya'll do?

JW: O.K. Kenneth Thomas walked off over toward the policeman's car, where the police officers were. So, I looked down, and I seen some money laying down there; and, I still didn't know what was going on. I just said maybe somebody lost the money or else-it didn't really cross my mind that the store had been robbed or nothing like that. I thought maybe somebody had dropped some money or something.

AC: O.K. Why didn't you pick up the money?

JW: I don't know. I..I...I don't know, something just told me don't mess

with the money, you know, so I just turned around and walked back to the car and got in my car and set down; and, I was waiting on Kenneth Thomas over there talking to the policemen.

AC: Were you afraid of that police officer?

JW: Yes, I was, because I was pretty intoxicated. I had been drinkin pretty good.

AC: If the police car had not been there, would you have picked up the money?

JW: I don't know, that's kinda hard to say. I don't know.

AC: If nobody had been in the parking lot at all...

JW: I probably would have.

JW: Mmmm, hm.

AC: Was anybody with him?

JW: No.

AC: O.K. He took you into this room and said what?

JW: Uh, he asked me did I think I could identify the victim, if I saw him. I told him no, I couldn't identify him.

AC: The victim?

JW: Uh, the whatever, the guy that's supposed to have been the murderer, or whatever, you know, and I told him no, I couldn't. So he said he said, "I've got some pictures here, and I want you to look through all these pictures and see if you can recognize this guy." So, I knew that I couldn't recognize him, so

what I did was, I just looked through the pictures and...

AC: Alright, wait a minute, before you get to that now.....were you in this room by yourself?

JW: Yes, I was. He left out. He said, "I'm going in the next room, and I'll be back in a few minutes."

AC: Alright, was there a desk in that room?

JW: Uh, yeah, I believe it was.

AC: Were you sitting at a desk?

JW: I was sitting in a chair, but it was a desk in there....but I was sitting in a chair.

AC: O.K., now the pictures when he gave them to you....were they spread out on the desk or were they in a group...?

JW: No, they were just in a big old stack, and I'd just take one off and look at each one.

AC: Alright, now what kind of pictures were these?

JW: It was just pictures of people in jail, I suppose, I don't know.

AC: O.K., now how many pictures did he show you?

JW: I'd say maybe it was probably about 10 or 15 pictures.

AC: O.K., now you looked at each picture.

JW: Mmm, hm.

AC: Did you recognize anybody from the pictures?

JW: No.

AC: O.K. Tell me exactly what you did.

JW: I looked at the picture, and I was going for name....I had heard the guy's name kinda singing around -- Willie Albert Smith--so what I did, I took the picture....I knew I couldn't recognize the guy, so I looked on the back of the picture, and I found out the picture had the name of each person wrote on the back of it. So, when I got to this picture, I got on the back of it, it said Willie Albert Smith, so I just said, "Well, this is the guy he wants." So, when he came back in, he said, "Could you recognize the guy?" I said, "No, I couldn't, but I guess the guy you want right here, his name on the back of the picture."

AC: Did you tell him that you had done it from the name on the back

AC: of the picture?

JW: Yeah.

AC: What did he say?

JW: He said, "Yeah, this is the guy, this is him."

AC: Did he ask you, "Can you identify this man?"

JW: Yeah, he asked me can I identify him.

AC: And, what did you tell him?

JW: I told him no. 'Cause I hadn't seen the man.

AC: What did he say when you told him that?

JW: I don't remember exactly what he said -- I think he said that maybe I couldn't identify him, and said that Kenneth Thomas couldn't

identify him, either, or something to that effect.

AC: Now, you're in this little room, and does he take the pictures back from you?

JW: Yeah.

AC: He took all of them?

JW: Mmm, hm.

AC: When he handed you the pictures the first time, was Smith's photograph on top, or do you remember?

JW: I don't.... I think it was kinda close to the top, because I think when I first start through them, I looked on the back, and I saw his name right away. And, I just went on and looked through the rest of them anyway. But, I already saw his name on the back of the

picture, from when I first started through the stack looking at the picture....I think he was kinda on the top.

AC: O.K. But, you did not identify that picture by looking at the picture?

JW: No, I couldn't. Cause I had never seen the guy before.

AC: But, his name was definitely on the back.

JW: Yeah, it was on the back of it.

AC: O.K. Now, when he took the pictures back, how long did he stay and talk to you after you said, "I believe this is the one you want."

JW: He didn't talk to me any longer. He just told me I could have a seat back out front, and they would let

us know when time for us to go up in the courtroom.

AC: Uh, he specifically.....did he ask you, "Can you identify this picture?"

JW: Yeah, he asked me can I identify the guy they had for trial that day.

AC: And what did you tell him?

JW: I told him no.

AC: And what did he say when you told him that.

JW: Well, I think he said that, "You can look through these pictures,

JW: but, Kenneth Thomas couldn't identify him either", I think he said.

AC: O.K. One of the things that you said, I believe, in your trial, was that you narrowed down the photographs to three. Do you remember saying that?

JW: I mighta said that, but that was.....I couldn't have because I wouldn'ta knew the guy if he hadda been standing right over me.

AC: Had you ever seen him before?

JW: Never in my life. If I did, I don't remember.

AC: Now, you left the District Attorney's office. You left this little room, then he said, "You can

go back out and sit down, in the waiting room?

JW: Mmm, hm.

AC: Was Kenneth Thomas out there?

JW: Yeah, he was.

AC: O.K. What did he say to you when you walked out?

JW: I think....we sat there for a while....I think we walked out, and I think he asked me was I in there talking to the D.A., and I told him yeah. I don't remember exactly what he said, but anyway we didn't talk none on the case.

AC: O.K. When did you leave that waiting room?

JW: I think we left around lunchtime, I believe, and went up and got something to eat; then, we came

back down to the waiting room around about 1:00, I think, or something like that.

AC: O.K. You stayed in the waiting room....you never went to the courtroom?

JW: No, we never went to the courtroom.

AC: You went to get something to eat? Did you discuss the case there?

JW: No.

AC: O.K....went back to the waiting room....how long did you stay?

JW: I think we stayed until around.....well, I think we went walking for a while, cause that's when we ran into some girls Kenneth know, and that's when I was telling them about, you know....they said I looked like I was scared, and asked

me was I witness with Kenneth Thomas and I told them yeah. One of them said, "You look like you scared." The other one said, "Well, Kenneth don't." Then one of them said, "Well, Kenneth probably (inaudible) get up there and tell a lie anyway, you know." Then we went back down to the waiting room, and see, that's when the D.A. came out and told us that we wasn't going to get a chance to go in the courtroom that day. He needed us to come back the next day.

AC: Was that the same man that took you in the back and showed you the pictures?

JW: Yeah.

AC: Now, he told you he wouldn't need you that day and you could leave?

JW: Uh, huh.

AC: What time did he tell you to be back?

JW: Uh, that next morning, I don't remember what day it was on.....

KT: he kept going. Anyway, we saw the guy when he got around to the door. I didn't see him actually put the lady in the car; but anyway, we went up by...across Ellis, went up Claiborne St. and went back on Capitol to that A & P up there by the corner of Capitol and Ellis. And, after they was closed, we started going back down Ellis Ave. and come to the corner where the light stopped us, we saw the police officer at the store. So, we stopped to ask them what happened. And uh, he said he didn't know what did we mean, "What happened?" So, we told him what we saw. And, at the present time, he asked, "Well, where was she at?", and he went

toward the door. And that's when we saw the money on the ground and her shoes and her eyeglasses and you know, other stuff on the ground like that. And uh, anyway, he got on the phone and called in and he asked us for our name and addresses and stuff, and told us that he was going to be getting in touch with us. So, we told him that all we wanted to do was inform him of what had happened, and uh, that we didn't want to get involved in it....cause James, he didn't want to stop in the first place....and uh, anyway, so we went to leave and he told us now that we couldn't nowhere. And, he was trying to...well, the way I felt as if he

was trying to say we knew more about it that what we was saying, you know, or something like that.

AC: Was the police officer white or black?

KT: Black.

AC: Was the lady you had earlier seen white or black?

KT: White.

AC: And, was the gentlemen that you saw.....the one that was in...

KT: Black.

AC: The one that was in a struggle with her was black?

KT: Right.

AC: Now, one question before you go into the police officer. Uh, did you even remotely recognize the guy?

KT: No.

AC: Could you see his face?

KT: No, he was looking down. And, the lady was between him and me.

AC: Now, Willie Albert Smith is the gentleman who was charged with this crime, with the murder of this woman, and was tried and put in jail. Can you tell me that that was definitely Willie Albert Smith?

KT: No. And, I tried telling them that all the time....you know, when they would take me down for lineup, I couldn't pick the guy out. And, when they showed me the pictures of them, I knew some of the guys that was on the pictures. And, I think it was two of them left that I didn't know, and I couldn't pick

him out....and they was telling me about one of the other guys that I did know....about the handicap that he had, you know, so I knew right off the bat it couldn'ta been him, you know....and, uh, they was telling about how I was already involved in the case, you know, because I knew what was going on and how I could go to jail for withholding evidence, you know, and stuff like this....and they was reminding me of the twenty-two years that I had suspended from my case that I was serving probation for at the time

AC: O.K. Back to the police officer....when you were up there,

at that point. You told the police officer and then you wanted to

AC: you testified nearly everything to the car, including the scratches on it, O.K.

KT: Right.

AC: But, point blank, that morning.....not from anything you've seen..that particular morning that you saw the struggle....how much of that car could you specifically identify?

KT: It was a red Pinto.

AC: And that was it?

KT: That was it.

AC: Could you tell me anything about stickers on the back?

KT: No.

AC: Could you tell me anything about carpet on the dashboard?

KT: No.

AC: And, as far as the man goes, you couldn't identify him at all?

KT: No.

AC: Now, when did they take you down to a lineup?

KT: Uh...I think it was....I don't remember exactly, but it wasn't too long after that.

AC: Is there anything else in that statement that you gave them....how did they take the statement from you? Did they write it, or did you write it?

KT: They wrote it.

AC: Was there anything in that statement they were writing down that you really didn't agree with, but they were writing anyway?

KT: I didn't read it.

Exhibit 6 (8)
Cowling - Direct 213.

AC: Alright. Is there anything else that happened during that interview that bothers you, that you can remember?

KT: When they was taking that statement?

AC: Yeah, when they were taking your statement. Who all was there?

KT: Uh, Ed Peters was there, and this uh....the guy up under him...I forget his name, the short guy.....he's an attorney, too. I can't remember his name....and uh, one be wearing the baggy corduroy coat.

AC: So, there were three of them?

KT: It was 3 of them.

AC: Is that the date they showed you any pictures? When they took your

statement, they showed you pictures?

KT: Yes.

AC: Do you remember how many pictures they showed you?

KT: Five, I believe.

AC: Out of the five, how many of them did you know?

KT: Three

Exhibit 6 (9)
Cowling - Direct 214.

AC: You knew 3 of the 5?

KT: When I was on the county farm, I did time with 2 of them. And one I know, personally.

AC: So, you knew 3 of them?

KT: Right.

AC: Alright, now...they only left you 2 photographs, 2 other people.

KT: And they told me about one guy was a handicapped guy...he had bad walking and had a messed up arm.

AC: Were these just face pictures, or were these hole body pictures?

KT: Face, from about the chest up.

AC: Did you....so you narrowed it down from 5 to 2, because you knew 3 of them. How did you pick out Smith's picture?

Exhibit 6 (9)
Cowling - Direct 214.

KT: Well, when he handed them to me, he stuck his arm out like he was handing them to me, but instead he laid them down on the desk on the side of me....and, they had the names on the back of them. And, he laid them down, face down.

AC: So, you saw the names.

KT: Right.

AC: Did you pick up the pictures?

KT: Yes.

AC: Did you go through them until you found his name?

KT: I went through the pictures, and I told them I knowed these 3 guys....and I told them about the other 2 that I didn't know. They asked me if I could pick him out, and I told him no. He said, "That

don't look like him?" I said, "That could be." He said, "Let me tell you now....that guy"...he was telling me about how the guy's arm was drawed up, like he had cerebral palsy or something, you know, and telling me about how he had a bad walk and stuff, like that....And that didn't leave but one guy, and I looked on the back of it, and I saw his name on it.

AC: What did you tell him when you had that last picture and gave it back to him? Did you say "This is the guy" or.....

KT: I say, "Well, that don't leave nobody but him...but I couldn't pick him out. I don't know what he looks like."

AC: What did he say?

KT: He said "Is that him there?" I told him, "I couldn't pick him out...but that's him, I seen his name on the back of it, so I presume that that's the guy there."

AC: How did you ever know Willie Albert Smith's name?

KT: They told me. It was on the back of the picture. That's the only way I could put his name and his face together.

AC: You didn't go to the lineup the same day?

KT: No.

Ac: But, the pictures and the statement came on the same day. And, it was Ed Peters and a short guy, another

lawyer, and some guy in a baggy corduroy.....

KT: All through it. They coached me from when they took the statements up to the day of the trial.

AC: And you had a ticket, and the investigator told you he'd do everything in his power to get it fixed for you.

KT: Right.

AC: When was the first time that you ever saw Willie Albert Smith?

KT: In the courtroom.

AC: Was that the same guy you saw in the lineup?

KT: Yes, but I mean when I know'd that that was him. See, in the lineup, I didn't know that was him.

AC: O.K. There was a suppression hearing, I believe....a hearing

before the trial came up. Do you remember?

KT: Yes.

AC: Did you go to that?

KT: No.

AC: You never went to anything before you testified at trial?

KT: I never went in there until I walked in the room and went on the stand. And after that, they ushered me out.

AC: Did Willie Albert Smith's sisters ever come talk to you?

KT: Yes.

AC: What did you tell them?

KT: Once I talked to them...they came by with a lawyer....and I told them the same thing I said at the trial...and the next time, they

came back again....no, she came and I told her (she was by herself - one of his big sisters)....and when they came back with the lawyer, my mother was home....and when they came over there and say that they wanted to ask me some questions...So, I said O.K.....I sat down with them and was going to answer them. My mother was telling me not to....so I told them, you know, it ain't going to hurt nothing....I say I ain't got nothing to hide no way, you know, so I started talking to them. And uh, no, I apologize, I lied....when she talked to me, I told her at the time that I didn't know him, that I couldn't pick him out....I didn't

see the guy. And they came with the lawyer and they was asking me again, and uh, that was after I had done talked to the police several times....and he asked me if I was sure that that was him, and I told him yeah. So his sister say, "Well, why did you tell my other sister that you didn't believe that that was him?" And uh, my mother, she cut in and say, "You don't be standing up here calling my son no lie....you can get your ass on out of my house and go." And, she was telling me not to say nothing else to them, you know, about it. And, she said something to my mother that I didn't like, and I told her husband that I thought it was time

for him to get his wife and lawyer and leave. He said that he wanted to ask me some questions, too, and I told him they going to need to get the hell off the porch...about talking to my mother like that....and I told them they was going to have to leave off the porch or they was get removed from the porch.

AC: All this stuff you went in an testified....now court's over....uh, what did they say to you after the trial...the D.A. or all those people?

KT: I did a good job.

Direct Examination by Mr. Kenney Cont'd:

Q. Mr. Cowling, just starting with the word "Robinson", from what I understand is the street, am I correct on that?

A. Yes, sir, it is.

Q. Could you describe to us what each line is moving back towards where it says store so that we can readily understand what this drawing means?

A. All right. On the extreme bottom, the line is the curb that abuts Westland parking lot. The next line up is the divided highway line. Next double line--

Q. Is that where it says Robinson?

A. Yes, sir. Right below where it says Robinson. The lines right under Robinson are double lines and that's the--the roadway. It's non-passing lane area. It's a four lane road. The broken line above that is for the street divider and then the lines above that are the beginning of the parking area for that particular store. Continue up, the broken spaces up and down are the parking spaces that are so marked now at the store. There is a--above that, there's a--where it says "telephone and cement walkway", there's a walkway that goes the entire distance and there's an overhang of the front of the store which I've gotten dotted. And the actual front of the store is up six

feet beyond the sixty feet that it's identified.

Q. Am I correct that that-- underneath where it says overhang, the cement walk indicated on the right continues all the way across to where it says "telephone"?

A. Yes, sir. And the opposite way as well.

Q. And I--I believe I asked you this, but these measurements in feet on the righthand side reflect the distance from--sixty feet is from the overhang to the curb, is that right?

A. Yes, sir. The actual overhang comes to the point of the curb where the parking area stops. Then you have the sidewalk that goes six feet up to the actual front of the store.

Q. I'm--I'm asking over here on the righthand side, you have an arrow that points down and then it says "sixty feet" and then it concludes--

A. That's from the base of the sidewalk out to the front of the roadway. That's not from the front of the store.

Q. And from the base of the sidewalk to the front of the store would be an additional six feet?

A. Yes, sir, it would.

Q. And from the curb on Robinson Road to the middle of the road would be an additional twelve feet, is that right?

A. To the middle of the road would be an additional twenty-four feet.

Q. To the middle of the eastbound lane, am I correct?

A. To the middle of the eastbound lane would be an additional twelve, yes, sir.

BY MR. KENNEY: May I have just a moment, Your Honor, and I think we'll be concluding?

(BRIEF PAUSE IN THE PROCEEDINGS.)

Q. So, in other words, there are some differences in--striking differences between the--the testimony of Mr. Thomas or the statement of Mr. Thomas that Mr. Wells now contends he fabricated his story from?

A. Well, I--I'll say this. There was--there are a--there's a great bit of elaboration that was given during testimony, after comparing the statement of Thomas and the testimony of Wells, that were not in Thomas' statement.

BY MR. WHITE: Okay. I have no further questions.

CROSS EXAMINATION BY MR. KENNEY:

Q. Now, Mr. Boyd, if I understand your testimony correctly, you went to Mr. Kirksey's office and you had

an opportunity to cross examine Mr. Thomas, am I right?

A. That's correct.

Q. And you did that for three, three and a half hours?

A. Because they would not let me record it, it took that long.

Q. But you had an opportunity to cross examine the witness for three and a half hours, am I right?

A. That's correct.

Q. And nobody prevented you from asking any questions you wanted to ask, did they?

A. No, sir.

Q. Now, during that cross examination, Mr. Thomas told you that he couldn't identify the person in that parking lot, didn't he?

A. Yes, sir, that's what he told me.

Q. And--and didn't he tell you that when he testified at the Smith trial and pointed this Petitioner out as the man he saw abducting Shirley Roberts that that was false testimony, didn't he?

A. Yes, sir, he told me that.

Q. He told you that--that he--after the incident in March of 1981, he was taken to a lineup, is that right?

A. I believe he--my--we tried to establish the exact timeframe as to when that occurred and I believe he indicated during his interview and I'm trying to distinguish from when it actually happened and when he told me.

Q. You're not saying it was after the trial?

A. No. No, it was--I want to say--I think he told me it was in the week after the incident occurred.

Q. And at the lineup, he was unable to identify the person in the parking lot at the Tote-Sum Store, is that right?

A. That's correct.

Q. And after the lineup was over, he was told that this Petitioner Smith was in that lineup, right?

A. Just a moment and let me look and see. (Long pause) Let me see that affidavit. (Pause) He didn't tell me that, or at least I have no notes of it.

Q. All right. After the lineup, he told the officers that he did not recognize anyone?

A. That's correct--

Q. Is that right?

A. Yeah, George Oatis did.

Q. He came downtown the following week, right?

A. Right.

Q. And made a statement. He went to the lineup.

A. That was all at the same time.

Q. He went to the car impoundment lot.

A. That was all at the same time.

Q. Okay. And he came down before the trial.

A. The only time, my understanding is, that he was talked to before the trial was on the day the trial actually began. Whether he was talked to at the suppression hearing,

you'll have to ask Mr. Peters about or someone in his office. I really don't know whether they did.

Q. But at any event, when you were cross examining Thomas, he indicated to you that they, meaning the police, wanted him to cooperate, is that not right?

A. Well, yeah, but you've got to understand the relationship between the police department and Kenny Thomas. That Mr. Thomas freely admitted that he had been an informant for the Jackson Police Department. That he, in fact, had been the one to turn the Connie Ray Evans case and that he had been working with the police department in this regard for a number of years was my understanding. So, I mean, Kenny -

Thomas', his statement in that regard that this is what they wanted him to do, I felt like it was just pure speculation on his part, because he could point to no objective evidence when I questioned him as to why he had these feelings.

Q. When you inquired of him on January the

I can say I didn't know that. I may have known it then, but I doubt very seriously that I did.

Q. Did you know that Thomas, when he was interviewed by the police and in his statement--he made a statement to Detective, I think it's Patton and Fondren--

A. Excuse me. Would you start over again? I was trying to think about that suppression hearing.

Q. Sure. Did you know, at the time you were starting the Smith trial, that Thomas, one of the witnesses who appeared and identified the Defendant, had given a statement to the police shortly after the event and he had not indicated in the statement that

he could identify anybody at all as the--as the perpetrator of the crime?

A. I probably knew that because I feel certain I would have reviewed the file prior to the trial and that probably would have been in the--in the file.

Q. But you did know, did you not, at the time the trial was beginning there were no eyewitness?

A. That was my impression, yes.

Q. And you knew when the trial began and you met Thomas in you office, that when he came into your office, he had already become the eyewitness?

A. I knew that somebody had and, as best I can recall and I'm--I'm having to exaggerate my memory here, but I'm assuming something, I assume and I think, my best belief would be that Don told me, "This is the guy that can identify him." because at that time, he went into the spill saying he could.

Q. But it was your impression, was it not--

A. Yes--

Q. --when he came into your office that this was the fellow that Bartlett had said, "Now, we have an eyewitness."?

A. That's right.

Q. And that was important to you in trying the case, was it not?

A. Oh, absolutely. No question about it.

Q. Because if you don't have an eyewitness, you've got an all circumstantial evidence case?

A. No question about it.

Q. And you've been trying these cases for quite a while, have you not?

A. These cases?

Q. Cases in which the State is prosecuting somebody for capital murder.

A. Oh, absolutely, yes.

Q. And you have experience in this area, do you not?

A. Yeah. I--I've got some.

Q. And you know no matter what instructions the Judge gives the jury on circumstantial evidence, it makes a difference to the jury whether it's circumstantial or whether there's an eyewitness?

A. If you have jurors on there that don't like circumstantial evidence, it make a difference. We try to get rid of those if we know we have a circumstantial case.

Q. Did you know in this case there were four

jurors who actually served who said in the voir dire that they would not convict unless there was eyewitness testimony?

A. You told me that and I don't have any reason to doubt that.

Q. Now, did you know--when you tried the case, were you aware, if you now recall, that the incident occurred, according to the general testimony of the trial transcript, at about 5:15 A.M. on March 15th, 1981?

A. You told me that and I don't have any reason to believe it--

Q. Do you have a recollection now--

A. I mean, I don't have any reason to doubt it--

Q. --that that was the time?

A. I--I'll take your word for it. I remember it was early in the morning and if you say that, I'd say you're absolutely right.

Q. In fact, at the time of the trial, do you have any recollection of that being important to you from an observation point of view?

A. I remember the important to me and I'll tell you the honest truth. To me the importance of it was what were these two other guys, Thomas and Wells, doing out riding around at that time in the morning. My impression was they probably intended to rip this place off themselves.

Q. But did you go out and find out, for your own purposes or for

the purposes of that trial, what the time of sunrise was on that day?

in the trial had never been asked to come down to the lineup. Did you know that?

A. If it's in the police file, I probably knew it and for some reason, I think that--that we were aware of that.

Q. Did you know that Wells had given a statement to the police shortly after the incident in which he said he couldn't identify--

A. If it's in the police file, I would have known that and I honestly can't say yes or no on that, but there's a good chance that I thought that when I started the trial. Because I remember specifically starting this trial thinking I wasn't going to have an eyewitness.

BY MR. KENNEY: May I have just a minute, Your Honor?

BY THE COURT: Yes, sir.

(BRIEF PAUSE IN THE PROCEEDINGS.)

Q. Mr. Peters, I just have one--one other question.

BY MR. KENNEY: May I ask it from here, Your Honor?

BY THE COURT: Yes, sir.

Q. Did you know when you called Thomas at (sic) a witness--as a witness in the Smith case, that he had, for some time, been an informer for the police department?

A. Did I know it then?

Q. Yeah.

A. I think that I can unequivocably say no, I didn't know it then. Since then I've learned that.

Exhibit 11
Peters - Redirect 325.

A PART OF THIS RECORD.)

Date March 18, 1981
Time 12:20 P.M. M

NAME
James E. Wells B/M 30
ADDRESS
2021 Lynch Street
WITNESS ☒ DEFENDANT ☐

Nature of Case:Murder Case: Where Shirley Roberts was murdered by Willie A. Smith.This occured on 3/15/81

My name is James Wells I am 30 years old I live at 2021 Lynch Street.I live there with my Grandmother. On Sunday morning a friend of mine by the name of Kennith Thomas and my self were riding around.We were in my car I was driving.We were headed East on Robinson When we got to the Tote-Sum across from Westland Plaza we saw a B/M get out of a small red car I think that it was a Pinto or a Vega.I saw a white lady get out of another car and start walking

Exhibit 11
Peters - Redirect 325.

toward the store.She had a purse in her hands.The black guy then walked toward her and grabbed her. He caught her around her neck slinging her and twisting her arm.We continued on east on Robinson Street. We went to Claiborne Street turned left on Claiborne Street and went to Capitol Street.When we got to Capitol Street we went back to Ellis headed south on Ellis and when we got back to Robinson Street we saw a policeman on the parking lot of the tote-sum store.We pulled into the store and asked him what had happened.The policeman asked us what we were talking about and we told him what we had seen.I then looked down on the ground and saw a $20 dollar bill. We then looked a little futher and saw I shoe. It was a ladies

Exhibit 11
Peters - Redirect 325.

shoe.About that time another police car came up and we left. This is all that I can tell you about this.

Q. James did you see a Black man fighting with a white woman on the parking lot of the tote-sum store on Robinson sunday morning.

A. Yes I did.

Q. James did you see this black man get out of a car.

A. Yes I did it was a red Pinto or a Vega

Q. Would you know this man if you saw him again.

A. I don't think I would I did not get a good look at him.

Q. Do you think that you would recognize the car if you saw it again.

Exhibit 11
Peters - Redirect 325.

A. I don't think I could I did not get a good look at it either.

Q. James is what you have told this Detective the truth to the best of your recoliction.

A. Yes it is.

Q. James can you read and write

A. Yes I can

Q. James after you read this statement and find it to be true and correct just as you have told it will you sign the statement.

A. Yes I will

signed /S/ James Wells

Time 1:20pm

Witness D.F. Fondren

Witness T.C. Barfield

Exhibit 12 - ID Only (4) 331.

NARRATIVE

91. Complainant's Name Roberts, Shirley	92. Charge Homicide/Murder
93. Case No. 81-7375	
DESCRIBE IN DETAIL HOW OFFENSE WAS COMMITTED (If OTHER is used in check off, explain here.)	
94. Date (mo./day/yr.) 3-15-81	
On this date I Sgt. G.E. Oatis while in route to pick-up the day watch supervisor decided to stop at the Tote-Sum Store at 2605 Robinson Rd. and used the phone. As I was doing this, I observed a vehicle pull up to the front of the store. A subject by the name of Kenneth	

Exhibit 12 - ID Only (4) 331.

Thomas approached this officer and asked what was going on. At about this time I observed on the concrete walk in front of the subject as he approached me a chain from the front door of the store also (1) 20^{00} bill and a set of car keys. Mr. Kenneth Thomas stated at this time that he and the driver of the vehicle in which he was riding (Mr. James Wells) was passing by this location when he observed a black male physically

SOLVABILITY FACTORS

[material omitted]

Exhibit 12 - ID Only (5) 332.

91. Complainant's Name Roberts, Shirley	92. Charge Homicide/Murder
93. Case No. 81-7375	
DESCRIBE IN DETAIL HOW OFFENSE WAS COMMITTED (If OTHER is used in check off, explain here.)	
94. Date (mo./day/yr.) 3-15-81	
forcing a white female into a red Ford pinto. Mr. Thomas stated they continued on east for two or three blocks but decided to return In a matter of seconds after receiving this information a description of the suspect and vehicle was put out on the radio.	

Exhibit 12 - ID Only (5) 332.

At this time the mobile crime lab was requested to the crime scene fearing a serious crime had been committed. Mean while further investigation of the crime scene by this Sgt. revealed a pair of Ladies eye-glass and a Ladies shoe near this officer patrol car. All items recovered at the crime scene by the mobile crime lab officer.

While this officer was protecting the crime scene and waiting for some

SOLVABILITY FACTORS

[material omitted]

Exhibit 12 - ID Only (10) 337.

SUPPLEMENTARY OFFENSE REPORT

1. Case Number 81-7375
2. Complainant's Name--Last, First, Middle (Firm if Bus.)
   Roberts, Shirley
3. Type of Firm ind.
4. Crime Murder
5. Address: 2853 Kentwood Drive
6. Phone
7. Classification Felony
8. S=Suspect or W=Wanted (Last, First, Middle)
   S=Smith, Willie, Albert
9. Race & Sex BM
10. Age 22
11. Height 5'8"
12. Weight 138
13. Hair & Eyes black/brown
14. ID Number or DOB 10/7/57
15. Social Security Number
    587-84-2027
16. Arrested? (Yes or No) yes
17. Address, Clothing and Other Identifying Marks or Characteristics
    109 Keystone Court, Jackson.
28. Describe Briefly How Offense Was Committed

On 3/15/81 this detective was contacted by Police radio and informed that a homicide had been committed and a body had been discovered in the woods behind

Exhibit 12 - ID Only (10) 337.

Keystone Court which is located in Subdivision #2 off of Lynch Street.

Upon arrival at this location I was joined by Detective Ronald Patton who assisted this detective in the investigation of this case.

I was briefly informed at this time that a report had been made by two citizens that the had observed a white female struggling with a black male in front of the Tote-Sum Store located at 2605 Robinson Street and stated that this person could possibly be this white female who is an employee of the Tote-Sum Store located at that address. Further details involving this will be discussed later in this report.

At this time this detective and Detective Patton was directed to the

Exhibit 12 - ID Only (10) 337.

rear of Keystone Court and through a wet boggy spot located on the northwest corner of Keystone Court and approximately 75 yards down a hillside to a wooded area which had a small creek running through this wooded area. The creek was approximately 4 feet wide and 4 feet deep. At this spot, a body had been found by Officer Terry Grice at approximately 0712 hours A.M. this date.

Upon arrival at the exact location of this body which I found to be approximately 150

[material omitted]

Complainant's Name Roberts, Shirley

Type of Crime Murder

Case Number 81-7375

yards north of Henley Street, this detective did observe what appeared to be a body under the water. This body was lying face down and had been covered with dead leaves and there was a disturbed spot where these leaves had been raked over this body. There was also a definite drag trail coming down the hill to the exact spot where the body was found.

The Hinds County Coroner Mr. Robert Martin was on the scene. He was conducting an investigation into the cause of death of the deceased and at

this time the body was removed from the water to be further examined. The body was that of a white female, approximately 45 years old, with brown hair. She was wearing faded blue jeans, a green and white pullover polo shirt which had been pulled up and was approximately pulled up to her shoulder blades. She was wearing no shoes, however had stockings on her feet. The shirt was on inside out. The bra was pulled up over her breasts, exposing her breasts. Her pants were unbuttoned in front. There was a small amount of blood coming from the mouth of this white female. This detective observed numerous bruises on the neck of this white female which indicated that she could have possibly been strangled and

also a definite bruise on the right outer forearm.

At the time this white female was removed from the water, she was wearing a white gold wedding ring with a diamond set in the ring on her left ring finger. She was wearing no other jewelry.

At this time the Jackson Fire Department arrived on the scene, took charge of the body and the body was then carried to the University Medical Center for an autopsy to be performed later on this white female.

At this time this detective, Detective Patton, Investigator David Adams and Investigator Welch went to the address of 109 Keystone Court which we learned to be a duplex located on the southeast corner of Keystone Court and

we were informed that this was the apartment of a possible suspect in this case Willie Albert Smith.

[material omitted]

Exhibit 12 - ID Only (13) 340.

Complainant's Name Roberts, Shirley

Type of Crime Murder

Case Number 81-7375

A report will be forthcoming from Sgt. Oatis in regards to this case, but we received the following information from Sgt. Oatis in regards to the following. He stated that sometime he believed around 5:30 A.M. this date, he stopped at the Tote-Sum Store at 2605 Robinson Road to use the outside telephone. He stated that he pulled his patrol car up to the phone, got [out] and was on the phone when a car with two black males later learned to be James Wells, 2021 J.R. Lynch Street, phone 353-9550, employed at Jackson State and

Kenneth Thomas, 109 Wingfield Circle, phone 355-5952, no place of employment given, and Sgt. Oatis stated that these people began to ask him what was going on and what had happened. Sgt. Oatis stated that he asked them what they were talking about because he did not know that anything had happened and they at this time, James Wells and Kenneth Thomas, told him that just minutes before they had been driving by this Tote-Sum Store and they had seen a black male struggling with a white female on the parking lot, trying to get her into a red Pinto which was parked in the parking lot.

Sgt. Oatis stated that at this time he called Communications and informed

them of the information he had just received and he put out to all cars to be on the look-out for a red Pinto with a white female and a black male in this car. Sgt. Oatis further stated that at the time he observed on the parking lot, a chain which had come from the front door of the Tote-Sum Store, a $20 bill, a pair of brass knuckles, a set of eyeglasses and he stated that under his car was a beige canvas shoe with a blue stripe on the shoe. Sgt. Oatis stated that at this [time] the evidence indicated that the operator of the store had been abducted from this location and was at this time with the black male in the red Pinto.

Exhibit 12 - ID Only (13) 340.

Sgt. Oatis further stated that he was still at the Tote-Sum Store talking with the Mobile Crime Lab and at this time he saw a red Pinto headed east on Robinson Street. He stated that this Pinto pulled into the Red Arrow Car Wash, backed out and turned around and headed back

[material omitted]

Exhibit 12 - ID only (15) 342.

CONTINUATION REPORT

Page 6

Complainant's Name Roberts, Shirley

Type of Crime Murder

Case Number 81-7375

he had supposedly carried the car to McDonalds brothers house.

Sgt. Oatis at this time asked McDonald if he would show him where Smith lived and Smith agreed to do this. At this time he was placed in the patrol car of Officer Howard and Officer Howard drove to 109 Keystone Court. At this location Officer Howard was joined by Officer Terry Grice. They went to the apartment which was indicated to them by McDonald as being the apartment of Willie Albert Smith and they found the

Exhibit 12 - ID only (15) 342.

CONTINUATION REPORT

front door open. He stated that they entered the apartment looking for the missing woman identified by this time to be Shirley Roberts. He stated that they went to the second bedroom to the left as you enter the door. He stated that there was an electric heater on in this room. There was also a radio playing and on the bed they observed the brown canvas purse belonging to Shirley Roberts. He stated that they also observed the muddy shoes, pants, the tracks leading from up the steps from the rear of the house and at this time they also observed what appeared to be tracks in the wet, damp area around on the northwest corner of the house. He

Exhibit 12 - ID only (15) 342.

CONTINUATION REPORT

Page 6

stated that they began to follow these tracks and they also observed the drag trail previously described, going down the hillside to the ditch. They stated that they saw the fresh leaves in the water and at this time they saw what they believed to be a foot sticking up slightly under the surface of the water and further examination revealed that it was a body of a white female, later identified as Shirley Roberts.

Reports will be made by Sgt. Oatis in regards to his activities in this case. Also reports will be made by Sgt. Grice and Howard in regards to their activities in this case.

Exhibit 12 - ID only (15) 342.

CONTINUATION REPORT

Page 6

Willie Albert Smith and Edward Charles McDonald were at this time brought to the City Jail, placed in jail and charged with murder in this case.

Upon arrival at Police Headquarters this detective and Detective Patton first talked with Edward Charles McDonald and learned from talking with Edward Charles McDonald that his family had obtained an attorney for him, being Mr. Jack R. Davis, office phone 355-6452.

[material omitted]

Exhibit 12 - ID Only (47) 374.

Date _____

Time _____

Name

KENNETH THOMAS

Address

1903 WINGFIELD CIR.

WITNESS ☐ DEFENDANT ☐

Nature of Case MURDER OF SHIRLY ROBERTS

MY NAME IS KENNETH THOMAS. I LIVE AT 1903 WINGFIELD CIR. HERE IN JACKSON. I AM 23 YEARS OLD. I CAN READ AND WRITE. ON PAST DATE, WHICH WAS 3-15-81 I ALONG WITH A FRIEND OF MINE BY THE NAME OF JAMES WELLS WERE DRIVING DOWN ROBINSON ROAD BETWEEN 05:00 & 05:30 IN THE MORNING. AS WE TRAVELED EAST ON ROBINSON IN FRONT OF THE TOTE-SUM STORE ACROSS FROM WESTLAND PLAZA WE SAW A WHITE LADY GET OUT OF A GREY CAR AND

Exhibit 12 - ID Only (47) 374.

WALK UP TO THE FRONT OF THE STORE. AT THE SAME WE SAW A BLACK MAN GET OUT OF A SMALL RED CAR, POSSIB[. . .] OR A PINTO AND BEGIN WALKING TOWARD THE WHITE LADY. THE BLACK MAN WAS ABOUT [. . .] FEET AWAY FROM THE WHITE LADY WHEN SHE TURNED AND BEGIN TO WALK TOWARD THE [BLACK] MAN, LOOKING DOWN IN HER PURSE. THE BLACK MAN CONTINUED TO WALK TOWARD [THE] WHITE LADY AND WHEN HE GOT UP ON HER HE GRABBED HER BY BOTH OF HER ARMS. THE WHITE LADY YELLED AT THIS POINT. THE BLACK MAN THE PUT ARMS AROUND HER SHOULDERS AND BEGIN TO DRAG THE WHITE LADY BACK TOWARD HIS CAR. WE HAD PAST AT [. . .] POINT AND STOPPED AT THE LIGHT AT ELLIS AVE. WE AT THIS POINT DOWN TO CLAIBORINE AND FROM CLAIBORINE TO CAPITOL ST. TO THE A & P STORE AT

Exhibit 12 - ID Only (47) 374.

CAPITOL AND ELLIS. THE A & P WAS CLOSED SO WE CAME BACK DOWN ELLIS AVE. WHEN WE GOT TO THE CONOR OF ELLIS AVE. AND ROBINSON WE SAW THE POLICE AT THAT TOTE-SUM. WE STOPPED AT THE [TOTE-]SUM THIS TIME TO ASK THE POLICE WHAT HAD HAPPEN. AT THIS POINT I TOLD HIM WHAT [WE] HAD SEEN. I SHOWED THE POLICE OFFICER WHERE THE BLACK MAN HAD GRABBED THE WHITE LADY AT. THIS IS WHEN WE LOOKED AND SAW THE MONEY AND THE CHAIN BY THE DOOR OF THE STORE. I GOT IN THE CAR AND TOLD THE POLICE OFFICER WHAT WE HAD SEEN. HE TOOK OUR NAMES AND ADDRESSES. WE LEFT AT THIS POINT.

Q. IS YOUR NAME KENNETH THOMAS AND DO YOU LIVE AT 1903 WINGFIELD CIR?

A. YES

Exhibit 12 - ID Only (47) 374.

Q. KENNETH DID YOU AND A FRIEND OF YOURS BY THE NAME OF JAMES WELLS SEE A BLACK MAN FORCE WHITE WOMAN INTO A SMALL RED CAR AT THE TOTE-SUM ON ROBINSON ACROSS FROM WESTLAND PLAZA ON PAS DATE?

A. YES

Q. DID YOU AND YOUR FRIEND CONTINUE PASS THE STORE WHEN YOU SAW THIS?

A. YES

Q. DID YOU AND YOUR FRIEND RETURN TO THE STORE LATER ON PAST DATE BEING 3-15-81 AND FIND THE POLICE THERE?

A. YES

Q. KENNETH DID YOU TELL THE POLICE WHAT YOU AND YOUR FRIEND HAD SEEN THE FIRST YOU ALL CAME BY THE STORE?

A. YES

Exhibit 12 - ID Only (47) 374.

Q. DID THE POLICE OFFICER THEN PUT YOU IN HIS CAR AND TAKE YOUR NAMES AND ADDRE[SSES]?

A. YES

Q. KENNETH AFTER READING THIS STATEMENT AND FINDING IT TO CORRECT AND TRUTH WILL YOU SIGN IT?

A. YES

WITNESSES R. Patton
D.F. Fondren

SIGNED /S/ Kenneth Thomas

DATE 3-16-81

TIME 9:55 A.M.

Department or every see Mr. Wells at the Jackson Police Department?

A. I did not.

Q. All right. Tell us about the interview with Mr. Wells.

A. I asked him if he would tell me what happened and he basically told me the same thing as Kenneth Thomas; that they were travelling in his automobile, Wells' automobile in front of the Tote-Sum Store and in the parking lot of this Tote-Sum Store around 5:15 in the morning, they saw a black male abduct a white woman and the black male forced the white woman in the black male's car and he gave me a description of the vehicle and the black male and the description was near the same as the one Kenneth Thomas had given me, a black

male, medium complexion, around 22 years old, five foot nine or ten, slender built, medium Afro hair style combed back, tan pants or trousers and a medium length brown coat. The man he saw he said he had a goatee and a moustache. At that time, I asked him did--would he look at some photographs and see if he recognized anyone from the photographs.

Q. To your knowledge, prior to that time had Mr. Wells ever been asked by anybody to identify the man that he saw that day?

A. To my knowledge, he had not.

Q. Go ahead.

A. I showed him the same photographs that I had shown Kenneth Thomas, in the same manner that I showed

them to Kenneth Thomas. I laid them face up on the coffee

table; asked him if he would look at them and see if he recognized anyone. He looked at the photographs and put his finger on Willie Smith's picture and said, "This is the man that I saw abduct the white lady--force the white lady into his car."

Q. All right. At any time during this interview with Mr. Wells did you ever leave the room?

A. I did not.

Q. All right, sir. Did you ever allow Mr. Wells to see the back of the pictures?

A. No.

Q. Did you ever take the pictures and stack them up face down with the names on the top so that he could see what the names were?

A. I did not.

Q. Did you ever suggest to Mr. Wells during the--during your interview of him and during this photographic lineup as to which one of these individuals was Willie Albert Smith?

A. I did not.

Q. Did anybody else in your presence?

A. No.

Q. Did anybody else during your interview with Mr. Thomas?

A. No.

Q. Now, during either one of these interviews, did anyone ever come into the room with y'all? Did anybody ever come in there?

A. After the interview with Mr. Thomas and

Cross Examination by Mr. Kenney Cont'd:

Q. Now, Lt. Bartlett, I'm going to be referring to the photographs as Exhibits 14 through 18 and I--I'll give them back to you there. I'm correct, am I not, that each one of those photographs has a name on the back?

A. Each one of the photographs has a name on the back reflecting the photo--the name of the photograph displayed on the other side.

Q. And would you take a look at the one that has Willie Smith marked on the back?

A. Yes. That's Exhibit 15. It's got Willie Albert Smith, date of birth 10-7-57.

Q. Well, I see Mr. Smith is not here right now, but did you see Mr. Smith here before--

BY THE COURT: Just a minute.

Where is he?

BY THE BAILIFF: He's in the restroom, Your Honor.

BY THE COURT: Let's wait until he gets back then.

(BRIEF PAUSE IN THE PROCEEDINGS UNTIL THE DEFENDANT RETURNED TO THE COURTROOM.)

Q. That Exhibit 15 is a picture of the Petitioner or the Defendant in this case, isn't it?

A. That's correct.

Q. You would not, in your practice with the District Attorney's office as an investigator, leave a potential witness in a room alone with photographs with the names on the back, am I right?

A. No, I would not.

Q. And would you explain to us why you would not do that?

A. Because the name--that's not fair. It would be im--it would be suggestive of--it's just not the proper way to conduct a lineup.

Q. And I take it if that was done or somebody said that you did that, that would--that would be a cause of upset to you and--

A. Yes--

Q. --commotion--

A. --if anybody says that I did that, they are a liar.

Q. And if somebody said that, you would want to know about it?

A. I certainly would.

Q. And am I correct that other investigators at the District Attorney's office would have the same reaction?

A. You'd have to ask them.

Q. But you would be surprised if they did not have the same reaction--

A. I would be surprised--

Q. --am I right--

A. --if they did not.

Q. And am I not correct that you would think that the same reaction would--would come from the District Attorney himself?

A. Of course, it would.

Q. And from any Assistant District Attorney?

A. Yes.

Q. Are you aware, Lt. Bartlett, that in this case, Wells testified at trial, under questioning by Vaughn Davis, that you left him in the room alone with the photographs?

A. I can't say what he testified to. I wasn't in the courtroom during the testimony of either Thomas or Wells.

Q. Did anyone ever mention that to you before I told you about it just now?

A. I don't know.

Q. You don't remember?

A. I didn't say that. I said, "I don't know."

Q. Now, would it refresh your recollection if I were to read from the

trial transcript Page 441. This is Mr. Davis questioning Mr. Wells: "Now, tell us how it happened that you saw the photographs?" "Yesterday morning"-- that's the question. Answer: "Yesterday morning, I was in his office and he brought me some photographs and he asked me could I identify the man and I told him I wasn't for sure, so he said he had some photographs that he wanted me to look at, so he brought me about four or five photographs and at that point, I narrowed them down to about three and that's when I identified the man." And then he says: "He then left the room?" "That's correct." "And you had it picked when he got back, is that right?" And Wells said, "That's correct." Now, that's referring to you, is it not?

A. I don't know.

Q. Well, weren't you the fellow--

A. Because that's not the way it was conducted.

Q. All right. Well, did someone else show Wells a separate photo spread?

A. No.

Q. So you're the fellow that showed Wells the photo spread--

A. I'm the person--I'm the man that conducted the photographic lineup.

Q. And does it not come as some surprise to you to know that Assistant District Attorney Davis elicited that testimony in front of Mr. Peters and in the courtroom in March of 1981 and you found out about it today, 1984?

A. No, it doesn't surprise me.

Q. Would you tell us how frequently while you were an investigator for the District Attorney's office you conducted photographic spreads with potential witnesses?

A. During the time I was assigned to the District Attorney's office, which was approximately three and a half years, I would say that I conducted approximately two photographic lineups per week.

Q. So, if I'm correct just sorta quickly calculating that up, it comes out to about 340 photographic lineups, am I right?

A. Yes, sir, at least that many.

Q. And would you be able to tell us with the specificity you've given

here exactly what happened in each one of those 340 lineups--showups?

there been a question involving the photographic identification or a photographic identification conducted by you?

A. No.

Q. How long has this case been in litigation?

A. Since the week of June the 27th, 1981, when the conviction was obtained.

Q. And during that time period, have you been called upon to recall the events of the photographic identification on several occasions--rather on numerous occasions during that interceding four years since the trial in this case?

A. Yes.

Q. So consequently, you've kept up with it?

A. I did.

Q. Now, the question was asked to you about contents of a statement given by Mr. Wells. I invite your attention to Exhibit No. 11 and ask you if you could read that question and--well, those two questions and two answers.

A. (Reading) "Question: Would you know this man if you saw him again? Answer: I don't think I would. I did not get a good look at him. Question: Do you think that you would recognize the car if you saw it again? Answer: I don't think I could. I did not get a good look at it either."

Q. All right. Both of them were I think, I think, is that correct?

A. That's correct.

Q. Neither one of them was unequivocal statements

that I questioned--as near as I can remember. I have not gone back and examined the transcript, but as near as I can remember, I questioned one of the two. As to which of the two I questioned, no, sir, I don't have any specific recollection.

Q. And the one that you questioned, as you were questioning him identified the Petitioner here, Willie Smith, as the--identified him as the person that witness saw in the Tote-Sum Store parking lot on the morning of the crime, is that right?

A. I believe that's correct, yes, sir.

Q. And did you interview that witness prior to eliciting that testimony?

A. No, sir, I did not.

Q. Did you have any conversation with the witness at all?

A. No, sir.

Q. Did you know that that witness four months earlier, the night of the crime or the day after the crime was committed, had given a statement to the police that he did not think he could identify the person because he did not get a good view of them?

A. I had the information that was in the police report, yes, sir. Other than that information, no, sir, I didn't have any other information.

Q. Did you know that that witness, who, I believe the transcript would reflect is Mr. Wells, was not called down to view a lineup?

A. I'm sorry. I don't--I don't understand

Q. Now, was Mr. Wells ever taken for a--a-- given a--shown a lineup of potential defendants in the case?

A. No, sir, was not.

Q. Why is that?

A. He told us that he did not get a good enough look at the suspect to be able to identify him.

Q. So based on that, y'all did not proceed with a lineup in that case?

A. That's correct.

Q. What about the vehicle? Did you ever show the vehicle to him?

A. He told us that he couldn't describe the car. He stated that it was only a small red vehicle.

Q. Now, what type of witness did you find Mr. Wells to be? Did he

volunteer things or was he a hard witness to get things out of?

A. He was relunctant when we first brought him to the office. You know, he stated that he didn't see anything. However, when confronted with the fact that Kenneth Thomas had given the statement and with the other facts that we had, that he had talked with the police officers, he agreed to give us a statement and he did freely and voluntarily give us a statement.

Q. Now, Detective Fondren, I'm going to show you several typed pages, nine in length, I believe, that have been made a part of overall Exhibit 12, and ask you if you can identify those particular items right there?

A. Yes, sir. This is a report that I made

Q. Now, would you tell us, did you know at the time you were doing this on--say, on March 16th when you saw Thomas, that he was an informant for the police department?

A. No, sir, I had no knowledge of that.

Q. Do you now know that he was an informant for the police department at that time?

A. I don't know to what extent that he was an informant. I--I've heard just through talk that people had had dealings with him. I personally, to the best of my knowledge, had never had any dealings with him.

Q. Is it your understanding that those dealin[gs] that you're talking

about went back to the trial of [the] Willie Smith case and earlier in 1981?

A. Prior to that.

Q. Prior to this case?

A. Yes, sir.

Q. That is your understanding?

A. I--I mean, I've got nothing to document that or anything. I--I've just heard that people knew him.

BY MR. KENNEY: I have no further questions. Your Honor, I--I call for whatever file or documentation there is that reflects that Thomas is an informant or was an informant at the time of this case. One thing I am certain about is that the trial counsel was not informed that the

witness called by the People as an eyewitness was, in fact,

working for the police department.

BY MR. BOYD: He was not working for the police department, Mr. Kenney--

BY MR. KENNEY: Well, I'd like to see whatever there is, Your Honor, to find out just what that relation was.

BY THE COURT: I don't know that they--that they keep any records on informants. That's the first I'd heard of them keeping records on informants, but--

REDIRECT EXAMINATION BY MR. BOYD:

Q. Do you keep records on informants?

A. No, sir.

Q. To your knowledge, does anybody with the Jackson Police Department keep records on informants?

A. No, sir. To the best of my knowledge, they don't.

Q. To your knowledge, is there any record kept on the fact that Kenny Thomas was an informant for the Burglary Division?

A. No, sir, and I had no knowledge that he was an informant.

Q. Now, did you--when you went to get Mr. Wells out at the Jackson State Security office, did you threaten him or in any way coerce him into going to the police department with you?

A. No, sir. I--I identified myself to him. I advised him that I'd like for him to accompany me to police

headquarters and I'd like to interview him in regards

you the report it will be easier for you to turn to it. It's about the middle and it's a report by Janis Howard of the same date, 3-15-81.

(BRIEF PAUSE IN THE PROCEEDINGS.)

BY THE COURT: Show the witness what you're referring to, Mr. Kenney.

BY MR. KENNEY: I'm sorry. Maybe I can find it for him. (Counsel looks through document) Does it start over here--yeah, yeah. It starts on that page.

A. Oh, you're speaking of James Howard, not Janis.

Q. Now, would you tell us who James Howard is and what his function was on that day?

A. Okay. On that particular day, Office[r . . .] was working for me and he was working Beat 7.

Q. And is he one of the people that wou[ld have] received the information on the radio?

A. Yes.

Q. And would this report reflect what he had received over the radio?

A. No.

BY MR. BOYD: Objection, Your Honor--

Q. Where would the information come from in this report?

BY MR. BOYD: Objection, Your Honor--

BY THE COURT: Overruled, if he knows.

Q. Where would Officer Howard have gotten the information that he filled in in this report?

A. Okay. This information would be first-hand information to him of things he had observed that was directed to him from a witness or complainant or whatever.

Q. Well, would you read the first part of the report, the first six or seven lines: "Along with other officers of P-2 began observing the area of west Jackson for a red Ford Pinto that was occupied by a black male suspect and a victim, white female." Now, where would he have gotten that information to write that down?

A. Okay. He would have gotten that from police radio.

Q. And that information, as you can see, does not include a specific description of a broken front grill,

decals on the back or carpeting on the front, does it?

A. No, it doesn't.

Q. And that information put out over the radio would necessarily have been information received from you out on Robinson Road, right?

A. Yes.

BY MR. KENNEY: I have no further questions of this witness.

BY THE COURT: Anything else, Mr. Boyd?

BY MR. BOYD: Yes, sir.

REDIRECT EXAMINATION BY MR. BOYD:

Q. Sgt. Oatis, is it unusual the fact that a specific detailed description is not contained in a report of this nature?

A. No. A lot was going on that morning and

APPENDIX G

STATE OF MISSISSIPPI

COUNTY OF HINDS

AFFIDAVIT OF JOHN E. GREGG

PERSONALLY APPEARED BEFORE ME, THE UNDERSIGNED AUTHORITY IN AND FOR THE STATE AND COUNTY OF AFORESAID, THIS DAY CAME JOHN E. GREGG, WHO ON HIS OATH STATES AS FOLLOWS:

(1) I am a member of the Mississippi Bar. I represented Willie Albert Smith in his capital murder trial in Jackson, Mississippi in 1981. This included representation at a pre-trial motion to suppress evidence.

(2) Attached is exhibit A* to this affidavit, a copy of the Jackson Police Department report of the investigation of the murder of Mrs.

Shirley Roberts. Apart from pages 1, 2, 3, Part of 17 and 18, 19, 20, 23, 24, 25, 33, 44, 49, 50, 52, 53, 54, 55, 56, 57, 59, I was never given or shown any of the reports or statements in this police report, nor was I told any of the information in this police report.

(3) The information contained in the pages of the police report that I did not receive would have been invaluable in representing Mr. Smith at the suppression hearing and at the trial.

Further Affiant saith not.

/S/ John E. Gregg

JOHN E. GREGG

SWORN TO AND SUBSCRIBED IN MY PRESENCE THIS THE 22 DAY OF OCTOBER, 1984, A NOTARY PUBLIC IN AND FOR THE COUNTY OF HINDS, AND STATE OF MISSISSIPPI.

/S/

NOTARY PUBLIC

My Commission Expires:

My Commission Expires Feb. 25, 1985.

---

* Exhibit A to the Gregg Affidavit is a copy of the police report. The complete report is Exhibit 12 of the Record on Appeal following the denial of Petition for Writ of Error Coram Nobis, excerpts of which are submitted herewith in Appendix F.

APPENDIX H

MISSISSIPPI CODE ANNOTATED

§ 99-39-27. Application to supreme court for leave to proceed in trial court; grant of relief; dismissal or denial as res judicata.

* * *

(9) The dismissal or denial of an application under this section is a final judgment and shall be a bar to a second or successive application under this chapter. Excepted from this prohibition is an application filed pursuant to section 99-19-57(2), Mississippi Code of 1972, raising the issue of the convict's supervening insanity prior to the execution of a sentence of death. A dismissal or denial of an application relating to insanity under section 99-19-57(2), Mississippi Code of 1972, shall be res judicata on the issue and shall

likewise bar any second or successive applications on the issue. Likewise excepted from this prohibition are those cases in which the prisoner can demonstrate either that there has been an intervening decision of the supreme court of either the state of Mississippi or the United States which would have actually adversely affected the outcome of his conviction or sentence or that he has evidence, not reasonably discoverable at the time of trial, which is of such nature that it would be practically conclusive that had such been introduced at trial it would have caused a different result in the conviction or sentence. Likewise exempted are those cases in which the prisoner claims that his sentence has expired or his probation, parole, or conditional release has been unlawfully revoked.

§ 99-39-23. Conduct of evidentiary hearing; right to counsel; finality of order as bar to subsequent motions; burden of proof.

* * *

(6) The order as provided in subsection (5) of this section or any order dismissing the prisoner's motion or otherwise denying relief under this chapter is a final judgment and shall be conclusive until reversed. It shall be a bar to a second or successive motion under this chapter. Excepted from this prohibition is a motion filed pursuant to section 99-19-57(2), Mississippi Code of 1972, raising the issue of the convict's supervening insanity prior to the execution of a sentence of death. A dismissal or denial of a motion relating to insanity under section 99-19-57(2), Mississippi Code of 1972, shall be res

judicata on the issue and shall likewise bar any second or successive motions on the issue. Likewise excepted from this prohibition are those cases in which the prisoner can demonstrate either that there has been an intervening decision of the supreme court of either the state of Mississippi or the United States which would have actually adversely affected the outcome of his conviction or sentence or that he has evidence, not reasonably discoverable at the time of trial, which is of such nature that it would be practically conclusive that had such been introduced at trial it would have caused a different result in the conviction or sentence. Likewise excepted are those cases in which the prisoner claims that his sentence has expired or his probation, parole or conditional release has been unlawfully revoked.

Supreme Court, U.S.
FILED
APR 5 1991
OFFICE OF THE CLERK

(3)

NO. 90-1164

In The Supreme Court of the United States

October Term, 1990

WILLIE ALBERT SMITH
PETITIONER

VERSUS

LEE ROY BLACK, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS
RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

BRIEF IN OPPOSITION

MIKE MOORE
ATTORNEY GENERAL
STATE OF MISSISSIPPI

MARVIN L. WHITE, JR.
ASSISTANT ATTORNEY GENERAL
COUNSEL OF RECORD

CHARLENE R. PIERCE
SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MISSISSIPPI 39205
TELEPHONE: (601) 359-3680

COUNSEL FOR RESPONDENT

64

QUESTION PRESENTED

I. Where Petitioner's Due Process Rights Were Not Violated By The Use Of The Testimony of Thomas And Wells Certiorari Should Be Denied.

II. Where The Court Below Correctly Decided That Clemons v. Mississippi Created A New Rule That Will Not Be Applied To Cases On Habeas Review Certiorari Should Be Denied.

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTRODUCTION 1

OPINION BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

A. Procedural History 3

B. Statement of Facts 12

REASONS FOR DENYING THE WRIT 13

ARGUMENT 13

I. Where Petitioner's Due Process Rights Were Not Violated By The Use Of The Testimony of Thomas And Wells Certiorari Should Be Denied. 13

II. Where The Court Below Correctly Decided That Clemons v. Mississippi Created A New Rule That Will Not Be Applied To Cases On Habeas Review Certiorari Should Be Denied. . . 27

CONCLUSION 54

CERTIFICATE OF SERVICE 56

TABLE OF AUTHORITIES

CASES **PAGE**

Brady v. Maryland, , 373 U.S. 667 (1963) 25

Burks v. Egeler, 512 F.2d 221, 229 (6th Cir.), cert. denied, 423 U.S. 937 (1975) 15

Butler v. McKeller, 494 U.S. ___, 110 S.Ct. ___, 108 L.Ed.2d 347 (1990) 14, 36, 44

Clemons v. Mississippi, 494 U.S. ___, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990) 30, 35, 36, 44-50, 54

Clemons v. State, 535 So.2d 1354 (Miss. 1988) 50

Collins v. Youngblood, 497 U.S. ___, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990) . . 32, 33, 35

Gideion v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) 47

Giglio v. United States, 405 U.S. 150 (1972) 25

Hill v. Black, 920 F.2d 249 (5th Cir. 1990) 49

In re Smith, 457 So.2d 911 (Miss. 1984) 9

Johnson v. State, 547 So.2d 59 (Miss. 1989) 50

Marcella v. United States, 344 F.2d 876 (9th Cir. 1965) 16

Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988) 47

Mooney v. Holohan, 294 U.S. 103 (1935) 13, 17, 25

Parker v. Dugger, 498 U.S. ___, 111 S.Ct. ___, 112 L.Ed.2d 812 (1991) 47-49

Penry v. Lynaugh, 492 U.S. ___, 109 S.Ct. 1212, 106 L.Ed.2d 256 (1989) . . . 14

Saffle v. Parks, 494 U.S. ___, 110 S.Ct. ___, 108 L.Ed.2d 415 (1990) . . 14, 36, 44

Sawyer v. Smith, 497 U.S. ___, 110 S.Ct. ___, 111 L.Ed.2d 193 (1990) . . 14, 35, 51

Smith v. Black, 904 F.2d 111 (5th Cir. 1990) . . . 2, 11, 12, 31, 45, 49

Smith v. Black, 904 F.2d 950 (5th Cir. 1990) 2, 31

Smith v. Black, 912 F.2d 1465 (5th Cir. 1990) . . . . . *, *

Smith v. Mississippi, 460 U.S. 1047 (1983) 7

Smith v. State, 419 So.2d 563 (Miss. 1982) 6, 12

Smith v. State, 434 So.2d 212 (Miss. 1983) 8, 29

Smith v. State, 492 So.2d 260 (Miss. 1986) 10

Smith v. State, 500 So.2d 973 (Miss. 1986) 10

Smith v. Thigpen, 689 F.Supp. 644 (S.D.Miss. 1988) 11, 12, 29

Smith v. Thigpen, Civil Action No. J83-0573(B) 11

Smith v. United States, 358 F.2d 683 (3rd Cir. 1966) 16

Smith v. Wainwright, 741 F.2d 1248 (11th Cir. 1984) 15

Stringer v. Black, 909 F.2d 111 (5th Cir. 1990) 49

Sullivan v. Sanders, 863 F.2d 218 (2nd Cir. 1988) 14, 18, 22

Sumner v. Mata, 449 U.S. 539 (1981) 26

Sumner v. Mata, 455 U.S. 591 (1982) 26, 27

Teague v. Lane, 489 U.S. ___, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) 14, 16-18, 31, 32, 35, 44, 47-49, 52, 54

United States ex rel. Burnett v. Illinois, 619 F.2d 668, 674 (7th Cir.), cert. denied, 449 U.S. 880 (1980) 15

United States v. Agurs, 427 U.S. 97 (1976) 25

United States v. Jones, 614 F.2 80 (5th Cir.), cert. denied, 446 U.S. 945 (1980) 15

Wild v. Oklahoma 187 F.2d 409 (10th Cir. 1951) 16

Wiley v. State, 517 So.2d 1373 (Miss. 1987) 53

AMENDMENTS, STATUTES AND RULES **PAGE**

28 U.S.C. §1257(3) 2

Eighth Amendment, United States Constitution 2

Fourteenth Amendment, United States Constitution 2

Miss. Code Ann., § 99-39-23(6), (Supp. 1990) 2

Miss. Code Ann., § 99-39-27(9) (Supp. 1990) 2, 52

U.S.C.A.§ 2254(d) 26

NO. 90-1164

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

WILLIE ALBERT SMITH,
Petitioner

versus

LEE ROY BLACK, Commissioner, Mississippi Department of Corrections, et al.,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

INTRODUCTION

Respondent, Lee Roy Black, respectfully prays that the Petition for Writ of Certiorari to the Supreme Court of the State of Mississippi be denied in this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit rendered on June 26, 1990, is reported as

Smith v. Black, 904 F.2d 111 (5th Cir. 1990). A copy of this opinion is before this Court as Appendix A to the petition for certiorari. On August 24, 1990, a petition for rehearing and suggestion for rehearing en banc was denied without opinion. Smith v. Black, 912 F.2d 1465 (5th Cir. 1990). See, Appendix B.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court under the authority of 28 U.S.C. §1254(1), he fails to do so.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner contends that this case involves the application of the Eighth and Fourteenth Amendments of the United States Constitution and Miss. Code Ann., §§ 99-39-27(9) and 99-39-23(6), (Supp. 1990). See, Appendix H.

STATEMENT OF THE CASE

A. Procedural History:

On March 15, 1981, petitioner was arrested for the capital murder of Shirley Roberts. On June 19, 1981, an indictment was returned in the Circuit Court for the First Judicial District of Hinds County, Mississippi, charging petitioner with killing Mrs. Roberts in the course of the commission of a robbery. On July 27, 1981, the matter was called for trial. On July 30, 1981, after returning a verdict of guilty of capital murder, the jury sentenced petitioner to death in the following verdict:

> We, the Jury, find unanimously and beyond a reasonable doubt the following aggravating circumstances:
>
> 1. The capital murder was committed while the defendant was engaged in the commission of robbery;

2. The capital murder was committed for pecuniary gain;

3. The capital murder was especially heinous, atrocious or cruel;

We, the Jury, further find unanimously from the evidence and beyond a reasonable doubt that, after weighing the mitigating circumstances and the aggravating circumstances, one against the other, that the aggravating circumstances do outweigh the mitigating circumstances and that the defendant should suffer the penalty of death.

Tr. at 1615.

Petitioner then took his automatic appeal to the Mississippi Supreme Court, raising the following assignments of error:

1. The trial court committed reversible error by admitting [sic] the prosecution to introduce the criminal record as being that of the defendant's and further by not declaring a mistrial at that point.

2. The Mississippi Code Annotated, §§ 97-3-21 and 99-19-101 (Supp. 1978), are unconstitutional and violative of the Eighth and Fourteenth

Amendments to the United States Constitution.

3. The trial court erred in allowing the prosecution to exhibit gruesome photographs of the victim to the jury for long periods of time during the sentence phase when the same photographs had been previously studied by the jury during the guilt phase of the trial.

4. The verdict of "guilty" in the guilt phase of the trial is contrary to the great weight of evidence.

5. The sentence of "death" in the sentencing phase of the trial is contrary to the great weight of the evidence.

6. The trial court erred in allowing the jury to find during the sentencing phase that the murder was committed for pecuniary gain.

7. The trial court erred in overruling the defendant's Motion to Suppress evidence taken from the defendant's apartment, and further erred by admitting the evidence in the trial over the defendant's objection.

Brief of Appellant on direct appeal.

On August 11, 1982, the conviction and sentence were affirmed by Mississippi Supreme Court. A petition for rehearing was filed and the original opinion was modified without disturbing the affirmance. This September 22, 1982, modified opinion continued to adhere to the previous ruling affirming the conviction and sentence of death. Smith v. State, 419 So.2d 563 (Miss. 1982)(Smith I).

Represented by new counsel petitioner filed a petition for writ of certiorari with this Court. In this first petition Smith raised the following grounds:

> 1. Where defense counsel is competent in some of the cross-examination of prosecution witnesses at a capital trial but is absolutely supine in the face of the prosecution's aggressive thrust at voir dire and in closing argument and fails to protect his client's interests at trial against the argumentative approach of the

prosecution, may counsel be deemed to have rendered ineffective assistance?

2. Should the standard for counsel's ineffective assistance be the farce and mockery test or should that standard be uniformly replaced by the "reasonable competence" standard?

3. Where police enter a dwelling under exigent circumstances without a WARRANT and briefly spot evidence on the premises before leaving to try to find and save a crime victim, may they return after there resolution of the emergency exigent circumstances and, still without a warrant, search for, identify and seize evidence?

Petition for Certiorari from Direct Appeal.

On March 21, 1983, this Court denied certiorari. Smith v. Mississippi, 460 U.S. 1047 (1983).

On April 21, 1983, petitioner commenced his sojourn through the intricate labyrinth of post-conviction collateral relief with the filing of an

Application for Leave to File a Petition for Writ of Error Coram Nobis in the Lower Court with the Mississippi Supreme Court, pursuant to Miss. Code Ann. § 99-35-145 (Repealed April 17, 1984). On June 1, 1983, the state supreme court denied petitioner's request for relief holding virtually all of his claims to be procedurally barred. On July 27, 1983, his petition for rehearing was denied. Smith v. State, 434 So.2d 212 (Miss. 1983)(Smith II).

On August 1, 1983, petitioner filed a petition for writ of habeas corpus with the United States District Court for the Southern District of Mississippi. A stay of execution was entered on August 17, 1983. Further proceedings were stayed in the District Court until such time as petitioner further exhausted his state court remedies. On January 31, 1984,

petitioner filed a second Application for Leave to File a Petition for Writ of Error Coram Nobis with the Lower Court with the Mississippi Supreme Court. Petitioner's allegations involved the claim that two witnesses perjured themselves at trial. This Court granted the application on September 26, 1984, and ordered an evidentiary hearing in the circuit court on the issue. In re Smith, 457 So.2d 911 (Miss. 1984)(Smith III). An evidentiary hearing was held on October 10, 1984, and the trial court issued an unpublished opinion and order on January 16, 1985, denying the requested relief.

Petitioner appealed this ruling to this Court. On March 9, 1986, the denial post-conviction relief was affirmed by the Mississippi Supreme Court. A petition for rehearing was denied on August 13, 1986.

Smith v. State, 492 So.2d 260 (Miss. 1986)(Smith IV).

While this second state post-conviction petition was pending petitioner, in August, 1985, filed yet a third post-conviction motion in state court. This third motion to vacate judgment and set aside sentence was filed under Section 99-39-1, et seq., Miss. Code Ann. (Supp. 1984). This motion was denied by the Mississippi Supreme Court on November 26, 1986. Rehearing was denied on February 11, 1987. Smith v. State, 500 So.2d 973 (Miss. 1986)(Smith V).

On April 7, 1987, petitioner amended his federal petition for writ of habeas corpus and reactivated the proceedings in the Federal District Court.

On June 13, 1988, the District Court issued its memorandum opinion and order denying habeas corpus relief to

petitioner. Smith v. Thigpen, 689 F.Supp. 644 (S.D.Miss. 1988). Petitioner then filed a motion to alter or amend the judgment entered by the District Court. This motion was denied in a two page memorandum opinion and order entered August 26, 1988. Smith v. Thigpen, Civil Action No. J83-0573(B). From this judgment denying habeas relief petitioner took an appeal to the United States Court of Appeals for the Fifth Circuit.

On June 26, 1990, the Fifth Circuit issued an opinion affirming the judgment of the District Court denying habeas corpus relief. The petition for rehearing was denied, without opinion, on August 24, 1990. Smith v. Black, 904 F.2d 950 (5th Cir. 1990). Petitioner then requested the Fifth Circuit to stay the mandate pending his petition for writ of certiorari this motion was denied on September 24, 1990.

Smith's petition for writ of certiorari from the ruling of the Fifth Circuit was originally due on November 23, 1990. Petitioner requested and was granted an extension of sixty (60) days.

B. Statement of Facts:

During the early morning hours of March 15, 1981, petitioner, kidnapped, raped and brutally murdered Shirley Roberts. The facts of this case are graphically and sufficiently set forth in the opinions of the various courts that have considered this case. See, Smith I, 419 So.2d at 564-565; Smith v. Thigpen, 689 F. Supp. at 646-647; Smith v. Black, 904 F.2d at 956-957.

REASONS FOR DENYING THE WRIT

Petitioner has presented no federal question of substance warranting this Court's exercise of its discretionary certiorari jurisdiction.

ARGUMENT

I. Where Petitioner's Due Process Rights Were Not Violated By The Use Of The Testimony of Thomas And Wells Certiorari Should Be Denied.

A QUESTION OF PERJURY?

Petitioner argues that this Court should overturn the precedent of Mooney v. Holohan, 294 U.S. 103 (1935), holding that there be knowing use of perjured testimony before there is a constitutional violation that would cause reversal of a conviction or sentence. Petitioner would have the Court announce a standard that would require reversal of a conviction or

sentence if there was a showing that there has been a "credible recantation of the testimony in question" that "would most likely change the outcome of the trial and a state leaves the conviction in place." The rule petitioner would have this court adopt is found in the case of Sullivan v. Sanders, 863 F.2d 218, 222 (2nd Cir. 1988). It is clear that such a decision would be constitute the announcement of a new rule. This is a course of action which this Court has clearly stated that it will not take in a case on federal collateral review. Teague v. Lane, 489 U.S. ___, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) and Penry v. Lynaugh, 492 U.S. ___, 109 S.Ct. 1212, 106 L.Ed.2d 256 (1989). See, Sawyer v. Smith, 497 U.S. ___, 110 S.Ct. ___, 111 L.Ed.2d 193 (1990), Butler v. McKeller, 494 U.S. ___, 110 S.Ct. ___, 108 L.Ed.2d 347 (1990) and Saffle v.

Parks, 494 U.S. ___, 110 S.Ct. ___, 108 L.Ed.2d 415 (1990). Therefore, even if the Court were of a mind to adopt such a rule we would submit that this is not the proper case in which such a new rule should be announced.

There can be no question that this would be the announcement of a new rule as the other court's that have considered this question have held that there must be knowing use of perjured testimony in order for there to be a due process violation of constitutional dimensions. See, United States ex rel. Burnett v. Illinois, 619 F.2d 668, 674 (7th Cir.), cert. denied, 449 U.S. 880 (1980); Burks v. Egeler, 512 F.2d 221, 229 (6th Cir.), cert. denied, 423 U.S. 937 (1975); Smith v. Wainwright, 741 F.2d 1248, 1257 (11th Cir. 1984); United States v. Jones, 614 F.2 80, 82 (5th Cir.), cert. denied, 446 U.S. 945

(1980); Smith v. United States, 358 F.2d 683 (3rd Cir. 1966); Marcella v. United States, 344 F.2d 876 (9th Cir. 1965); Wild v. Oklahoma 187 F.2d 409, 410 (10th Cir. 1951). Since this Court and the circuit courts that have considered this question have held that there must be a knowing use of perjured testimony in order to make out a due process violation it can hardly be said that such a claim is one of those "bedrock" elements of criminal procedure that represent an exception to Teague.

Likewise, the invitation to the district court and the court below to adopt a negligence standard when considering questions of perjured testimony would require the announcement of a new rule on habeas review. This course of action would also be contrary to the precedent of Teague and its progeny.

The question remains whether the respondent has waived this point at this stage of the proceedings. The brief of respondent was filed less than a month after the decision in Teague. While not citing Teague in its brief to the court below respondent did argue that the district court was correct in rejecting "[p]etitioner's request to . . . engraft upon [the rule of Mooney] some sort of negligence standard." Further, respondent pointed out that petitioner had "cited no authority from [the Fifth Circuit] or nay other adopting such a standard." Finally, respondent argued that the "District Court was correct in eschewing such an invitation [to adopt a negligence rule] by petitioner and holding that the standard set forth in Mooney was the proper test." Brief for Respondent-Appellees at 12. We submit that this argument is sufficient to

preserve the Teague argument at this stage.

While not waiving the bar against announcing a new rule, respondent would point out that even Sullivan requires a credible recantation of the trial testimony. We submit that there has been no such credible recantation in the case at bar.

The history of the so-called perjured testimony is important to the discussion before the case today. The contention is that two of the state's witnesses, Thomas and Wells, perjured themselves at trial when they identified petitioner as the person they saw abducting Shirley Roberts from the Tote-Sum store on Robinson Road in Jackson, Mississippi on March 15, 1981. These witnesses later recanted their identifications in written affidavits obtained through the questionable tactics

of the defendant's family and a private detective agency. Based on these affidavits the Mississippi Supreme Court ordered an evidentiary hearing in the trial court on the matter of whether or not the witnesses perjured themselves at trial and whether or not the state knowingly used perjured testimony. After a hearing on theses claims the state trial court issued a memorandum opinion and order finding that there had been no perjury and that there had been no knowing presentation of false evidence at trial. On appeal from this ruling, the Mississippi Supreme Court disagreed with the trial court and held that the witnesses did perjure themselves.[1] The state supreme court also held, that at

---

[1] The Mississippi Supreme Court based its finding of perjury on the fact that Thomas and Wells had never recanted their recantation.

best there was negligent use of some perjured testimony by the prosecution, but because of the overwhelming nature of the remaining evidence in this case this was not ground for reversal of the conviction or sentence.

On habeas review in the district court the district court held that the standard to be applied to perjured testimony was whether or not the prosecution actually knew that testimony they used was perjured. The negligence standard was forwarded by petitioner was rejected. Additionally, the district court disagreed with the finding of the Mississippi Supreme Court regarding whether or not Thomas and Wells actually perjured themselves. He agreed with the state trial judge that held the evidentiary hearing in this matter that there was no perjury. The district court

properly articulated reasons for finding that the Mississippi Supreme Court's findings were not fairly supported by the record.[2]

On appeal to the Fifth Circuit the court noted the unusual circumstance of a petitioner arguing for federal deference and the state urging agreement with the district court's rejection of the state supreme court's conclusion. However, the court below decided it did not have to address this question because there was no knowing use of perjured testimony by the state. Therefore, there was no ground for habeas relief.

In the state of the record before this Court it can hardly be said that

---

[2] The district court recognized that it had to make detailed findings as to why the finding of the Mississippi Supreme Court was not fairly supported by the record. He did so. 689 F. Supp. 652-657.

there has been a credible recantation of the trial testimony. The state trial court and the federal district court have found that there was no perjury. The Mississippi Supreme Court has held that because the recantations go unrecanted there must be perjury. Where there is such a disagreement over the question of whether or not there has even been perjured testimony introduced at trial it can hardly be said that there is a credible recantation of the trial testimony. Therefore, petitioner's argument under Sullivan, is unpersuasive.

Likewise, petitioner's urging of a negligence standard is with out persuasive force. As the court below held:

> Smith's argument for an extension of the negligence standard of **United States v. Agurs**, 427 U.S. 97, 96 S.C.t 2392, 49 L.Ed.2d 342 (1976), is not sufficiently convincing to override this practice. As the

district court explained, Smith's use of **Giglio v. United States**, 405 U.S. 150, 152-54, 92 S.Ct. 763, 765-66, 31 L.Ed.2d 104 (1972), to support the negligence standard is inapposite; **Giglio** concerned the particular circumstances of the nondisclosure of a promise of nonprosecution made in exchange for witness testimony. **Agurs** afterward reported that the rule of **Brady** may "arguably" apply in the situation in which "undisclosed evidence demonstrates that the prosecution's case includes perjured testimony and that the prosecution knew, or should have known, of the perjury,' but was clear in reporting the subsequently settled rule that knowing use of perjured testimony was fundamentally unfair. 427 U.S. at 103-04, 96 S.Ct. at 2397-98. The discussion in **Agurs** relied on by Smith more precisely referred to the materiality of nondisclosed evidence, a subject considered below in connection with his **Brady** claim.

Reviewed under the **Mooney** standard, and assuming without deciding that the in-court identification constituted perjury, Smith does not establish that the prosecution knew. Cf. **Braxton**, 641 F.2d at 395. For the very reasons

detailed by the district court toward the contention the testimony was not perjury, 689 F.Supp. at 652-657, the prosecutors could reasonably have concluded that the inconsistency of Wells and Thomas related to a reluctance to testify. Both evidenced a detailed observation of the abduction in their initial contact with he police, although they indicated on that occasion and others preceding trial that they could not identify the culprit. Thomas, however, contended at trial that he had in fact recognized Smith at the police lineup, and had so informed the prosecution on the first day of the trial. Thomas coherently explained his vacillations: he had refrained from identifying Smith to the prosecution because of pressure he felt from relatives, and likewise had told Smith's sisters and defense counsel's son that he could not identify the perpetrator, but had to tell the truth when eh was forced to testify under subpoena. Wells, the eyewitness whose testimony proved less damaging to Smith, simply testified that he had identified Smith at his first opportunity to do so, in the photographic lineup. The credibility of these explanations is cast into severest doubt by their after-

> trial recantations, but the prosecution cannot be charged with knowledge of their latent positions. We cannot conclude that what appears to have been the Mississippi Supreme Court's conclusion that the prosecution did not knowingly use perjured testimony, **Smith v. State**, 492 So.2d at 267, was not fairly supported by the record. **Sumner v. Mata**, 449 U.S. at 551-52, 101 S.Ct. at 771.

904 F.2d at 961-962.

The court below correctly concluded that the prosecution did not knowingly use perjured testimony. Petitioner's reading of United States v. Agurs, 427 U.S. 97 (1976), Giglio v. United States, 405 U.S. 150 (1972), and Brady v. Maryland, , 373 U.S. 667 (1963), as overruling Mooney is incorrect. Consequently, we submit that the Fifth Circuit, the district court and the Mississippi Supreme Court were all correct in holding that there was no knowing use of perjured testimony.

Therefor there is no relief available to petition.

Further, respondent would reurge its argument that the state trial court and the federal district court were correct in their findings that there was no perjury. Respondent agrees with the teachings of Sumner v. Mata, 449 U.S. 539 (1981) (Sumner I), holding that, generally a finding of fact by a state court, even an appellate court, is to be afforded a presumption of correctness by a federal court in a habeas proceeding. U.S.C.A.§ 2254(d). However, this is not an inviolate wall. In Sumner v. Mata, 455 U.S. 591 (1982) (Sumner II), this Court held:

> [I]f a federal court concluded that the presumption of correctness does not control, it must provide a written explanation of the reasoning that led it conclude that one or more of the first seven factors

> listed in §2254 were present, or the "reasoning which led it to conclude that the state finding was "not fairly supported by the record." 449 U.S., 551, 66 L.Ed.2d, 101 S.Ct. 764.
>
> 71 L.Ed.2d at 484.

The district court fully complied with the dictates of Sumner II making his detailed findings as to why the Mississippi Supreme Court's conclusion was not fairly supported by the state court record. We submit that the district court, like the state trial court, was correct in his conclusion that there was not perjured testimony.

We would submit that the issue was correctly decided by the court below and certiorari should be denied.

II. Where The Court Below Correctly Decided That Clemons v. Mississippi Created A New Rule That Will Not Be Applied To Cases On Habeas Review Certiorari Should Be Denied.

The court below was presented with a question involving the application of the "especially heinous" aggravating factor. The states initial response to the question was that the claim was procedurally barred from consideration for the failure to timely object at trial. The Mississippi Supreme Court found the claim to be procedurally barred from consideration on state post-conviction review stating:

> At trial there was no objection to the instruction on the aggravating circumstance set forth in Mississippi Code Annotated § 99-19-101(5)(h) as to the heinous, atrocious, or cruel nature of the murder. Likewise, the giving of this instruction was not raised on direct appeal, barring petitioner from raising it in post-conviction proceedings. See Mississippi Supreme Court Rule 42.

Smith II, 434 So.2d at 218.[3]

On habeas review the district court held both in its original opinion and in the opinion on the motion to alter or amend that this claim was barred from consideration because it was not raised at trial or on direct appeal. Petitioner's claim was that "Mississippi's use of heinousness as an aggravating factor is not sufficiently limited." The district court in answer held: "None of these issues was raised at trial or on direct appeal, and they are procedurally barred." Smith v. Thigpen, 689 F.2d 644, 662-663 (N.D. Miss. 1988). The procedural bar was the basis of our response in the original briefs filed in the court of appeals.

---

[3] There is nothing ambiguous about the application of the state procedural bar to this question. Therefore, there is no Harris v. Reed, 489 U.S. 255 (1989), problem.

In the meantime this Court decided the case of Clemons v. Mississippi, 494 U.S. ___, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990). Petitioner requested and was granted leave to file a supplemental brief based on this Court's decision in Clemons. The basis of the response of the state was that the claim continued to be procedurally barred from consideration for the failure to present the claim at the proper time and the proper manner. This response was filed on April 18, 1990.

On May 15, 1990, the court of appeals requested that both parties file a reply to the following question.

> Does the claim of petitioner that his sentence was unconstitutionally imposed in light of **Maynard vs. Cartridge**, [sic] 486 U.S. 356 (1988), and **Clemons vs. Mississippi**, 110 S.Ct. 1441 (1990), rely on constitutional rules which are "new" relative to the date on which his conviction became final, and which are the subject

of the non-retroactivity rule originating in **Teague vs. Lane**, 109 S.Ct. 1060 (1989)?

The respondent argued that the claim was barred by Teague. Respondent also reiterated that the claim was procedurally barred in any event for the failure to raise the claim in state court at the proper time and the proper manner.[4]

On June 26, 1990, the court below issued its opinion holding that consideration of the "especially heinous" claim was barred by Teague. Smith, 904 F.2d 950 (5th Cir. 1990).[5]

---

[4] We continue to assert that this is a adequate and independent state law ground that bars consideration of this issue.

[5] The court below decided that the Teague inquiry should be made before an inquiry in to whether or not the claim was procedurally barred from review on state law grounds. Finding that Teague, the court concluded that it did not have to reach the procedural bar question or the merits of the claim.

The first question that we must consider is whether it was proper for the district court to raise the issue of non-retroactivity on its own motion. The basis of petitioner's argument is that Collins v. Youngblood, 497 U.S. ___, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990), prohibits such action. While this court made clear that a court "need not" raise the Teague bar on its own motion, there is no prohibition to one doing so. The Court stated:

> Generally speaking, "[r]etroactivity is properly treated as a threshold question, for, once a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated." **Teague**, supra, at 300, 103 L.Ed.2d 334, 109 S.Ct. 1060. The State of Texas, however, did not address retroactivity in its petition for certiorari or its briefs on the merits, and when asked about the issue at oral argument, counsel answered that

> the State had chosen not to rely on **Teague**. Tr. of Oral arg. 4-5. Although the **Teague** rule is grounded in important considerations of federal-state relations, we think it is not "jurisdictional" in the sense that this Court, despite a limited grant of certiorari, must raise and decide the issue sua sponte. Cf. **Patsy v. Board of Regents of Fla.**, 457 U.S. 496, 515, n. 19, 73 L.Ed.2d 172, 102 S.C.t 2557 (1982) (Eleventh Amendment defense need not be raised and decided by the Court on its own motion.). We granted certiorari to consider the merits of respondent's ex post facto claim, and we proceed to do so.
>
> 111 L.Ed.2d at 38.

The clear implication from the Court's opinion in Collins, is if the retroactivity defense had been raised in the briefs or even at oral argument that the Court would have had to address the question of retroactivity. The court below considered the effect of Collins before it proceeded to address the question. The court held in footnote 12:

After **Teague**, which sua sponte considered the nonretroactivity issue based on the suggestion on an amicus brief, 109 S.Ct. at 1069, circuit courts have split as to the appropriateness of considering **Teague** limitations without the issue having been raised by the parties. Compare, e.g. **Hill v. McMackin**, 893 F.2d 810, 813 (6th Cir 1989) (deciding application of **Teague**) with **Hanrahan v. Greer**, 896 F.2d 241, 245 (7th Cir. 1990). The Fifth Circuit has not explicitly confronted the issue. Given **Teague** itself and the subsequent sua sponte resolution of **Saffle v. Parks**, ___ U.S. ___, 110 S.Ct. 1257, 1264 n. 1, 108 L.Ed.2d 415 (1990) (Brennan, J., dissenting), we believe the better choice is to reach the **Teague** issue now pressed by the State. Compare **Collins v. Youngblood**, ___ U.S. ___, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990) (declining to reach **Teague** question abjured by counsel for state); **Patsy v. Board of Regents of Fla.**, 457 U.S. 496, 515 n. 19, 102 S.Ct. 2557, 2567 n.19, 13 L.Ed.2d 172 (1982) (complying with request of state to pass on potential Eleventh Amendment issue).

904 F.2d at 981.

We submit that Collins simply states that Teague is not a jurisdictional rule that must be raised in every case. This does not prevent a court from raising the question sua sponte. The court below committed no error in raising the question of retroactivity.

Looking to what the court below held we find that it concluded that this Court "limited for the first time Mississippi's practice of supporting a death sentence on the basis of a remaining, valid aggravating factor." 904 F.2d at 983. Judge King's analysis is clear and correct in holding that Clemons represents new law that is not available to petitioner in a federal post-conviction setting. The opinion of the court below correctly applies the constitutional standard to the question at hand. Sawyer v. Smith, 497 U.S. ___, 110 S.Ct. 2822, 109 L.Ed.2d 193

(1990); Saffle v. Parks, 494 U.S. ___, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990); Butler v. McKeller, 494 U.S. ___, 101 S.Ct. 1212, 108 L.Ed.2d 347 (1990). A look at the opinion of the Fifth Circuit will be helpful as it would be hard to embellish on the excellent analysis found there. After looking at the opinion in Clemons, the court below held:

> **Saffle's** reading of **Lockett** and **Eddings** stressed that "[t]here is a simple and logical difference between rules that govern what factors the jury must be permitted to consider in making its sentencing decision, and rules that govern how the State may guide the jury in considering ans weighing those factors in reaching a decision," and noted that rules regarding "how [the jury] must consider the mitigating evidence" were not within the ambit of those cases. ___ U.S. at ___, 110 S.Ct. at 1261; see also **Sawyer v. Smith**, ___ U.S. ___, ___, 110 S.Ct. 2822, 2828, 111 L.Ed.2d 193 (1990) ("general proposition[s]" divined from **Lockett** and **Eddings** insufficiently determinative for

Teague test, aff'g **Sawyer v. Butler**, 881 F.2d 1273 (5th Cir. 1989) (en banc). Mississippi's practice neither addresses what factors the jury may consider, nor, in fact, any consideration by the jury at all; the jury in Smith's case. per instance, was free to consider any statutory or non statutory mitigating evidence it chose. Mississippi has simply developed a practice as one component of its review process that ignores invalid aggravating circumstances for the sake of valid ones.

Not until **Clemons v. Mississippi** did the United States Supreme Court specifically apply **Godfrey** and **Maynard** to the Mississippi aggravating circumstance, and before that application it could at least be said that the constitutional practice of Mississippi's redemptive status was ambiguous, making reasonable for **Teague** purposes the rule preceding **Clemons**. See **Butler**, ___ U.S. at ___, 110 S.Ct. at 1217; **Saffle**, ___ U.S. at, 110 S.C.t at 1260-61. In **Evans v. Thigpen**, 809 F.2d 239, 241 (5th Cir.)(dicta), cert. denied, 483 U.S. 1033, 107 S.Ct. 3278, 97 L.Ed.2d 782 (1987), **Edwards v. Scroggy**, 849 F.2d 204, 211 n.7 (5th Cir. 1988), cert. denied, ___ U.S. ___, 109 S.Ct. 1328, 103 L.Ed.2d 597 (9189), and most

recently in **Stringer v. Jackson**, 862 F.2d 1108, 1113-15 (5th Cir. 1990), which the Supreme Court has vacated and remanded for consideration in light of **Clemons v. Mississippi**, see ___ U.S. ___, 110 S.Ct. 1800, 108 L.Ed.2d 931 (1990), various panels of this court have sustained death sentences premised in part on an invalid aggravating circumstance by recognizing the Mississippi practice of sustaining verdicts when supported by at least one valid aggravating circumstance. Under this practice, perhaps first represented in **Evans v. State**, 422 So.2d 737, 743 (Miss. 1982), cert. denied, 461 U.S. 939, 103 S.Ct. 2111, 77 L.Ed.2d 314 (1983), the Mississippi Supreme Court typically would recognize the problematic constitutionality of the "especially heinous, atrocious, or cruel" aggravating circumstance, possibly review the sentence for proportionality and under the **Coleman** limiting construction of the circumstance, and uphold the sentence if in any event the jury had found at least one other valid aggravating circumstance. See, e.g., **Pinkney v. State**, 538 So.2d 329, 355-58 (Miss.1988), vacated and remanded for further consideration in light of Clemons v. Mississippi, ___ U.S.

___, 110 S.Ct. 1800, 108 L.Ed. 931 (1990); **Lanier v. State**, 533 So.2d 473, 491 (Miss. 1988) (alternative holding; sentence vacated on other grounds); **Lockett v. State**, 517 So.2d 1317, 1336 (Miss.1987) (alternative holding), cert. denied, 487 U.s. 1210, 108 S.C.t 2858, 101 L.Ed.2d 895 (1988); **Johnson v. State**, 511 So.2d 1333, 1336-39 (Miss. 1987) (alternative) rev'd sub nom. **Johnson v. Mississippi**, 486 U.S. 578, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988); **Stringer v. State**, 500 So.2d 928, 944-45 (Miss.1986); **Irving v. State**, 498 So.2d 305, 314 (Miss. 1986) (alternative holding), 481 U.S. 1042, 107 S.C.t 1986, 95 L.Ed.2d 826 (1987); **Edwards v. State**, 441 So.2d 84, 92 (Miss. 1983) (alternative holding; sentence vacated on divided opinion; **Tokman v. State**, 435 So.2d 664, 670 (Miss. 1984) (alternative holding), cert. denied, 467 U.S. 1256, 104 S.Ct. 3527, 82 L.Ed.(1984).

This practice relied in part on decisions of the Supreme Court subsequent to **Lockett** and **Eddings** (and subsequent by a matter of months to the point at which Smith's conviction became final) that might with hindsight be read as anticipating **Clemons**, but at the time might have appeared to confirm the

constitutionality of the Mississippi practice. **Zant v. Stephens**, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983), upheld a death sentence administered under the Georgia sentencing scheme when one of the three aggravating circumstances found by the jury was subsequently held invalid by the Georgia Supreme Court while the other two aggravating circumstances were specifically upheld. Although the opinion recognized the potential difference attending a "weighing" state, id. at 873 n.12, 890-91, 103 S.Ct. at 2741 n. 12, 2750, the chief import of the decision was often viewed as confirming the constitutional latitude afforded the common state practice of redeeming death sentences when more than one aggravating circumstance was present, and **Zant** was relied upon by this court and the Mississippi Supreme Court in warranting the Mississippi practice. See, e.g., **Stringer v. Jackson**, 862 F.2d at 113-14; **Lanier v. State**, 533 So.2d at 491; **Lockett v. State**, 517 So.2d at 1336; **Johnson v. State**, 511 So.2d at 1336-39; **Stringer v. State**, 500 So.2d at 944-45; **Irving v. State**, 498 So.2d at 314.[16] Similarly, while the plurality opinion in **Barclay v. Florida**, 463 U.S. 939, 103 S.C.t 3418, 77 L.Ed.2d 1134 (1983),

might have suggested a reservation regarding certain circumstances in "weighing" states, see id. at 954 n. 12, the opinion also noted that Florida, like Georgia, "requires the sentencer to find at least one valid aggravating circumstance before the death penalty may even be considered," id. at 954, 103 S.Ct. at 3427, and ultimately upheld the Florida scheme. Finally, **Maynard v. Cartwright** left to Oklahoma the redetermination of sentence and recognized the possibility that the court"would not necessarily set aside a death penalty where on appeal one of several aggravating circumstances has been found invalid or unsupported by the evidence." 486 U.S. at 365, 108 S.Ct. at 1860.

To the extent that these cases contain reservations distinguishing schemes like that administered by Mississippi, it cannot be said that such distinctions represented legal determinations that control the outcome of Smith's case, and certainly not so for the law applicable at the time his conviction became final. The Supreme Court explicitly acknowledged at a time prior to that date that it would not distinguish between functionally similar sentencing schemes, even

if the differences would obviate the potential distinctions marking a "weighing" state. See **Franklin v. Lynaugh**, 487 U.s. 164, 108 S.Ct. 2320, 2331 n. 12, 101 L.Ed.2d 155 (1988) (citing **Adams v. Texas**, 448 U.S. 38, 46, 100 S.Ct. 2521, 2526, 65 L.Ed.2d 581 (1980)); see also **Stringer v. Jackson**, 862 F.2d at 1115 (opining that there is "no difference, other than on in semantics, between instructing a jury to weigh aggravating against mitigating circumstances in determining the sentence in instructing a jury to consider all aggravating and mitigating circumstances in deciding on the sentence"). Of the large number of cases which have enforced a practice such as that of Mississippi, the majority have ignored fine distinctions among the various states's capital schemes. [Citations omitted.]

Rather than allowing the federal judiciary a means of reneging on its commitment to the proposition that there is no "one right way for a State to set up its capital sentencing scheme," **Spaziano v. Florida**, 468 U.S. 447, 464, 104 S.Ct. 3154, 3164, 82 L.Ed.2d 340 (1984), the **Teague** doctrine in part tolerates the diversity of state schemes by accepting the fact that various jurisdictions will not always correctly

anticipate the ultimate constitutional significance of every detail. Instead, "reasonable, good-faith interpretations of existing precedents" are sufficient to prevent application of new law. **Butler** 110 S.Ct. at 1217; see also **Sawyer v. Smith**, ___ U.S. at ___, 110 S.Ct. at 2828-29 (incorrect characterization of Supreme Court precedent by Mississippi Supreme Court further indicates extent to which subsequent constitutional ruling was not dictated.) We hold, consequently, that the application of **Clemons** to Smith would involve the application of a "new rule" on collateral review, a practice normally barred by **Teague**.

---

[16] **Butler's** observation regarding the retroactivity of judicial rhetoric is surely appropriate to any effort to locate the distinctions of **Clemons** in **Zant**. In **Johnson v. Mississippi**, for example, the Court stressed its "specific[] reli[ance]" in that case on the admissibility of evidence at the sentencing hearing, 486 U.s. 578, 590, n.9, 10 S.Ct. 1981 n. 9, 100 L.Ed.2d 575 (1988), a characterization of **Zant** that by itself might well warrant affirming Smith's sentence.

904 F.2d at 984-986.

Clearly, the Fifth Circuit applied the proper constitutional standard when analyzing whether or not Clemons represents new law. There was close adherence to the teachings of Butler and Saffle. The decision in Clemons, setting forth limitations on Mississippi's practice of supporting a death sentence on the basis of the remaining, valid aggravating factors was not dictated by prior precedent of this Court.

Even though the question of whether or not Clemons, is new was answered in a manner against petitioner's position, that did not end the inquiry. As it was required to do, the Fifth Circuit continued its analysis to determine whether or not Clemons represented a decision that fell into one of the two exceptions to the application of Teague.

Since, the decision in Clemons would not decriminalize a class of conduct nor would it prohibit the imposition of capital punishment on a particular class of individuals the first exception would not have any application to Stringer's case. Smith, 904 F.2d at 986.

Looking to the second exception the Fifth Circuit held:

> The second exception is for those rare "watershed rules of criminal procedure" which implicate the fundamental fairness and accuracy of the criminal proceeding. See **Saffle,** ___ **U.S.** at ___, 110 S.Ct. at 1263; **Butler,** 110 S.Ct. at 1218. As the en banc court noted in **Sawyer v. Butler,** 881 F.2d 1273, 1294 (5th Cir. 1989) (en banc), aff'd, sub nom. **Sawyer v. Smith,** ___ U.S. ___, 110 S.Ct. 2822, 111 L.Ed.2d 193 (1990), this exception is tailored to those rules designed to redress constitutional violations which "so distort the judicial process as to leave one with the impression that there has been no judicial determination at all, or else skew the actual evidence crucial

> to the trier of fact;s disposition of the case," and does not include procedurally flawed contemplation or review of relevant evidence. As the Supreme Court recently observed in **Sawyer v. Smith**, "[a]ll of our Eighth Amendment jurisprudence concerning capital sentencing is directed toward the enhancement of reliability and accuracy in some sense," but **Teague's** second exception is limited to "watershed" rules affecting "bedrock procedural elements." ___ U.S. at ___, 110 S.Ct. at 2931. The rule on which Smith would rely is not such exalted stature.
>
> Because we conclude that a necessary component of Smith's claim that the use of the "especially heinous" aggravating circumstance in his sentencing phase was barred by **Teague**, we do not consider whether that claim has been procedurally barred or has merit.
>
> 904 F.2d at 986-987.42

This analysis is correct. In Clemons, the Court stated that on remand the Mississippi Supreme Court could preform a reweighing of the aggravating and mitigating circumstances or it could

perform a "harmless error analysis" and affirm a death sentence in the face of an invalid aggravating circumstance. The fact that the appellate court is allowed to perform a harmless error analysis to a Clemons error demonstrates that it is not the "watershed" or "bedrock procedural elements" spoken of in Teague. The Court has usually cited Gideion v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) as an example of the type rule that comes within this exception. It cannot be said that Clemons or Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), either one come within this exception.

Petitioner, further contends that Parker v. Dugger, 498 U.S. ___, 111 S.Ct. ___, 112 L.Ed.2d 812 (1991), represents the retroactive application of Clemons, to a case on federal post-conviction review

thereby voiding the reasoning of the Fifth Circuit. At first reading this misconception might be entertained. However, upon inquiry beyond the surface we find this is not the case. Upon inspection, the answer becomes clear. The decision in Parker is, at best, inconclusive as to whether Clemons should be applied retroactively. The simple reason for this position is that the bar found in Teague, was never interposed as a defense to the claim presented to the United States Supreme Court. Teague is not mentioned in the briefs filed by Florida, nor was it mentioned at oral argument of the case.[6] Therefore, Parker does not represent precedent that causes a

---

[6] As is noted in Florida's petition for rehearing the issue upon which Parker was reversed was not one of the questions presented to the Court for resolution.

conflict with the ruling of the court below in Hill v. Black, 920 F.2d 249 (5th Cir. 1990); Stringer v. Black, 909 F.2d 111 (5th Cir. 1990) and Smith.

In Parker, as we stated above, the issue of retroactivity was not raised in the briefs or at oral argument. This Court was under no duty to raise the claim on its own motion, a course that was specifically declined by the State of Texas. In the posture of the case, the issue of the retroactivity of Clemons never come up in Parker and the Court chose not to address the issue on its own motion. The decision offers no guidance on the issue of whether or not Clemons is to be applied retroactively.

Petitioner contends that respondent has waived the point when it did not raise Teague in the response to the supplemental brief filed in the court below. However,

since the Fifth Circuit was free to raise the retroactivity issue sua sponte it cannot be said that the respondent has waived the defense.

Petitioner's argument that under state law Clemons is not new law because the Mississippi Supreme Court, in Johnson v. State, 547 So.2d 59 (Miss. 1989), changed Mississippi law is not availing. First, the Mississippi Supreme Court, in Johnson, did not change Mississippi law. It simply stated that it had two courses of action open to it, remand the case to the trial court for a new sentencing hearing or reimpose the sentence of death itself. There was no change in the law as to the process the court would employ if it chose to make the decision to reimpose the sentence of death. This is clear as the court cited its decision in Clemons v.

State, 535 So.2d 1354 (Miss. 1988), as the basis for the decision.

In any event, this Court made plain that "'the availability of a claim under state law does not of itself establish that a claim was available under the United States Constitution.'" Sawyer, 111 L.Ed.2d at 209. In Sawyer, when discussing reliance on state law to claim that a rule is not new law, the Court stated:

> Reliance od State law cases for the proposition that the rule adopted in **Caldwell** was an old one misapprehends the function of federal habeas corpus. As we have said, the "'relevant frame of reference'" for the new rule inquiry "'is not the purpose of the new rule whose benefit the [defendant] seeks, but instead the purposes for which the writ of habeas corpus is made available.'" **Teague**, 489 U.S., at 306, 103 L.Ed.2d 334, 109 S.Ct. 1060 (quoting **Mackey v. United States**, 401 U.S. 667, 682, 28 L.Ed.2d 404, 91 S.Ct. 1160 (1971)). Federal habeas corpus serves to ensure that

> state convictions comport with the federal law that was established at the time the petitioner's conviction became final.
>
> 111 L.Ed.2d at 209-210.

Therefore, the state of the law in Mississippi at present is not a factor that is considered when making the analysis as to whether a rule is new under Teague.

Finally, petitioner argues that the Mississippi Post-Conviction Collateral Relief Act, allows for consideration of "new law" in successive petitions. Petitioner bases that assertion on Miss. Code Ann., § 99-39-27(9) (Supp. 1990), which states in part that "excepted form [the prohibition to the filing of second or successive petitions] are those cases in which the prisoner can demonstrate either that there has been an intervening decision of the supreme court of either

the state of Mississippi or the United States which would have actually adversely affected the outcome of his conviction or sentence . . ." This might be persuasive without reading the case law that has construed this provision. In Wiley v. State, 517 So.2d 1373 (Miss. 1987), the Mississippi Supreme Court held:

> Wiley refers to the "intervening decision" of the U.S. Supreme Court in **Booth v. Maryland**, ___ U.S. ___, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987). However, an intervening decision alone does not preclude a waiver under Miss. Code Ann. § 99-39-21, but can only except the case from the effect of the three-year statute of limitations in §99-39-5(2) and the prohibition of second petitions in § 99-39-27(9). [Emphasis added.]
>
> 571 So.2d at 1377.

Wiley was pursuing his first post-conviction petition when this decision was rendered, Smith's presently has his fourth petition pending before the state court.

As was pointed out above this claim was held to be procedurally barred by the Mississippi Supreme Court in the first post-conviction petition. Therefore, the exception could not grant petitioner relief.

The Fifth Circuit correctly and properly found that "the application of Clemons to Smith's case would involve the application of a 'new rule' on collateral review, a practice normally barred by Teague." 904 F.2d 986. Since the decision of the court below is correct certiorari should be denied.

CONCLUSION

For the above and foregoing reasons the petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit in this case should be denied.

Respectfully submitted,
MIKE MOORE
ATTORNEY GENERAL
STATE OF MISSISSIPPI

MARVIN L. WHITE, JR.
ASSISTANT ATTORNEY GENERAL
(Counsel of Record)

CHARLENE R. PIERCE
SPECIAL ASSISTANT
ATTORNEY GENERAL

COUNSEL FOR RESPONDENT

Office of the Attoreny General
Post Office Box 220
Jackson, Mississippi 39025
Telephone: (601) 359-3680

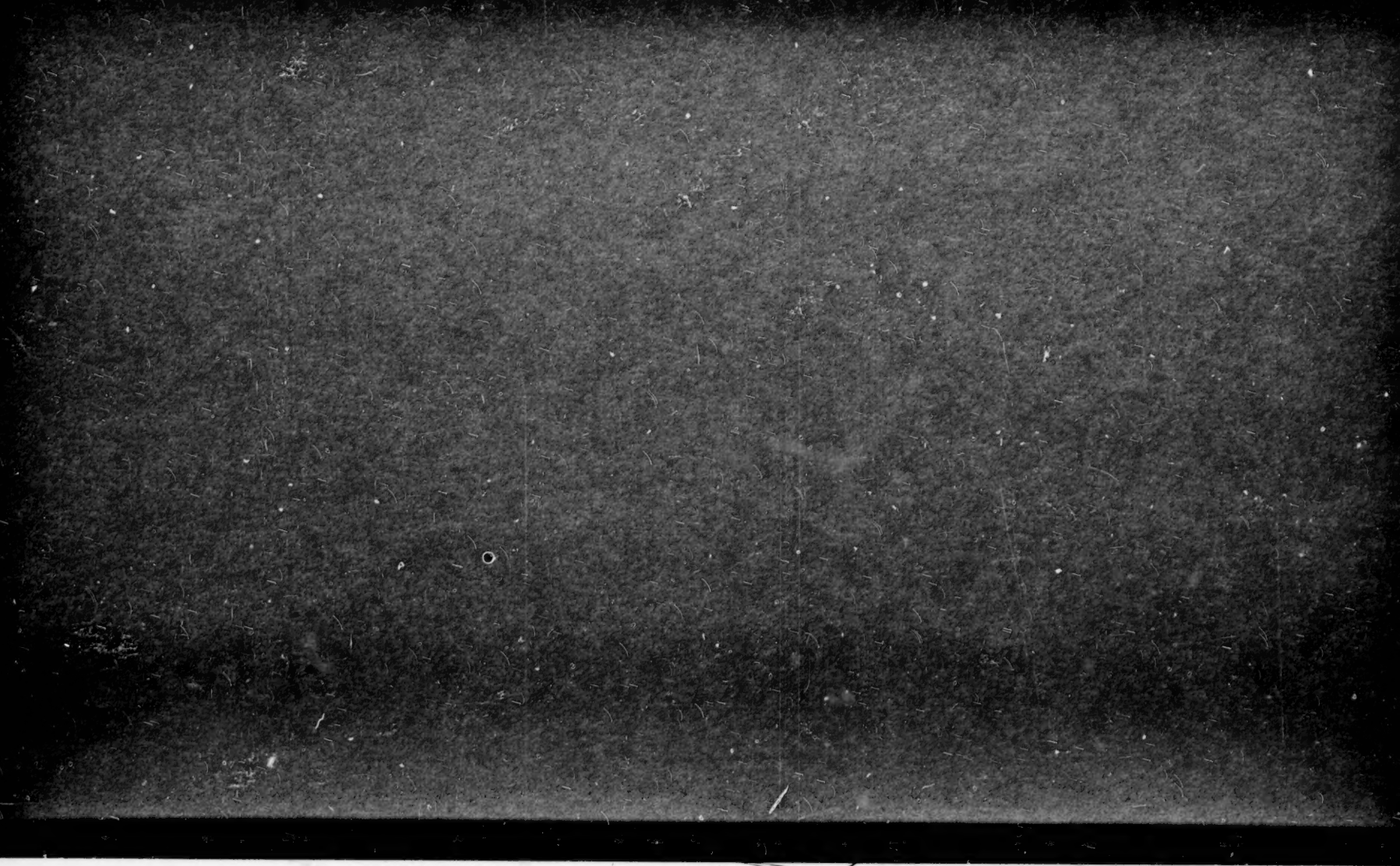
CERTIFICATE OF SERVICE

I, Marvin L. White, Jr., Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day caused to be mailed, via United States Postal Service, first-class postage prepaid, three (3) true and correct copies of the foregoing **Brief in Opposition** to the following:

Bruce D. Angiolillo, Esquire
Simpson Thacher & Bartlett
425 Lexington Avenue
New York, New York 10017-3909

This the 5th day of April, 1991.

MARVIN L. WHITE, JR.



No. 90-1164

Supreme Court, U.S.
FILED
APR 16 1991
OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

WILLIE ALBERT SMITH,

Petitioner,

vs.

LEE ROY BLACK, Commissioner
Mississippi Department of Corrections, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

BRUCE D. ANGIOLILLO
Counsel of Record

JOHN J. KENNEY
DAVID E. MASSENGILL
SIMPSON THACHER & BARTLETT
(A partnership which includes
professional corporations)
Attorneys for Petitioner
Willie Albert Smith
425 Lexington Avenue
New York, New York 10017-3909
(212) 455-2000

April 16, 1991

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

I. THE PROSECUTOR'S USE OF PERJURED EYEWITNESS TESTIMONY VIOLATED PETITIONER'S RIGHT TO DUE PROCESS OF LAW 1

A. Teague Does Not Bar This Court From Correcting A Violation Of Basic Elements Of Fairness: The Execution Of A Man Based Upon Perjured Testimony . . . 5

B. Petitioner's Claim Implicates Bedrock Procedural Elements, Which Make Teague Inapplicable 7

C. The Mississippi Supreme Court's Ruling That The Eyewitness Testimony Was False Is Fully Supported By The Record; Counsel For Respondents May Not Ask This Court To Find That The Mississippi Supreme Court's Unanimous Finding Of Fact Was Unfounded 11

Page

II. THE "ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL" ISSUE IS NOT PROCEDURALLY BARRED AND REQUIRES THAT CERTIORARI BE GRANTED 14

A. Parker v. Dugger Establishes Petitioner's Right To Review 16

B. Petitioner Is Not Procedurally Barred 19

CONCLUSION 20

TABLE OF AUTHORITIES

Cases

Brady v. Maryland,
373 U.S. 83 (1963) 3-4, 7, 9

Burden v. Zant, ___ U.S. ___, 111
S. Ct. 862 (1991) 12

Clemons v. Mississippi, ___ U.S.
___, 110 S. Ct. 1441 (1990) . . . 14-17

Eddings v. Oklahoma,
455 U.S. 104 (1982) 17

Lockett v. Ohio,
438 U.S. 586 (1978) 17

Maynard v. Cartwright,
486 U.S. 356 (1988) 18

Mesarosh v. United States,
352 U.S. 1 (1956) 10

Mooney v. Holohan,
294 U.S. 103 (1935) 6, 9, 10

Parker v. Dugger, ___ U.S. ___,
111 S. Ct. 731 (1991) 15-19

Reddix v. Thigpen, 805 F.2d 506
(5th Cir. 1986) 20

Sanders v. Sullivan, 863 F.2d
218 (2d Cir. 1988) 2-3, 6, 10

Smith v. Black, 904 F.2d 950
(5th Cir. 1990) 15, 19

Smith v. State, 419 So. 2d 563
(Miss. 1982), cert. denied, 460
U.S. 1047 (1983) 14

Smith v. State, 434 So. 2d 212
(Miss. 1983) 19

Smith v. State, 492 So. 2d 260
(Miss. 1986) 1-2, 11-12

Sumner v. Mata,
449 U.S. 539 (1981) 12

Teague v. Lane,
489 U.S. 288 (1989)
. 3-10
. . . . . 15, 18-19

United States v. Agurs,
427 U.S. 97 (1976) 7

Wheat v. Thigpen, 793 F.2d 621
(5th Cir. 1986) 19-20

No. 90-1164

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

WILLIE ALBERT SMITH,

Petitioner,

v.

LEE ROY BLACK, Commissioner,
Mississippi Dept. of Corrections, et al.,

Respondents.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. THE PROSECUTOR'S USE OF PERJURED EYEWITNESS TESTIMONY VIOLATED PETITIONER'S RIGHT TO DUE PROCESS OF LAW

Petitioner was convicted and sentenced to die following a trial in which the State of Mississippi proffered two "eyewitnesses" who pointedly identified Petitioner in the courtroom. A unanimous Mississippi Supreme Court held that the "eyewitness" testimony was false:

> [I]t has been clearly established that two of the state's witnesses committed perjury at this trial.

Smith v. State, 492 So. 2d 260, 261

(Miss. 1986). The State of Mississippi nevertheless opposes review by this Court and seeks to execute Petitioner.

The Court below held that it is of no consequence that the State may have acted negligently in offering perjured testimony at trial or that the State now knows that the death sentence rests on perjured testimony. The death sentence may be carried out.

Petitioner submits that this is wrong and violates the due process clause of the Fourteenth Amendment to the United States Constitution. The corruption of the judicial process by the use of perjured testimony has been condemned by this Court for decades. Moreover, in Sanders v. Sullivan, 863 F.2d 218 (2d Cir. 1988), the Second Circuit noted that when the State knows that a death sentence rests on perjured evidence, it

is a violation of basic due process and fairness to nevertheless proceed to carry out that sentence.

The State makes no attempt to defend the fairness of executing a man knowing that his death sentence rests on perjured testimony. Instead, the State argues for the first time that Teague v. Lane, 489 U.S. 288 (1989), bars this Court from correcting the wrong on habeas review.

Because Respondents raised Teague for the first time in this Court, that argument has been waived.[1/] Moreover, Teague does not and should not apply.

This Court's decisions over the years have censured the use of perjured testimony. And under the line of cases beginning with Brady v. Maryland, 373

1/ The State has waived the Teague v. Lane defense on the perjury issue even more clearly than on the aggravating circumstance issue. See Petition for Writ of Certiorari at 62-63.

U.S. 83 (1963), this Court has held that even negligent conduct by the State that has the effect of preventing a fair trial through suppressing evidence is a ground for setting aside a conviction. Barring the negligent use of perjured testimony cannot be considered a new rule of law.

Even if that were not the case, and even if a State were to have greater leeway to affirmatively offer perjured testimony than it has to withhold evidence, Teague would still allow this Court to announce a new rule barring such use of perjured testimony.

This Court recognized in Teague that certain rules should be announced, even on habeas corpus. This Court stated that rules implicating basic procedural fairness are an exception to the normal application of Teague. This Court recognized that the federal courts have

an obligation to deal with a "bedrock procedural element" which is ". . . the kind of absolute prerequisite to fundamental fairness that is 'implicit in the concept of ordered liberty.'" 489 U.S. at 314. This is such a case.

A. Teague Does Not Bar This Court From Correcting A Violation Of Basic Elements Of Fairness: The Execution Of A Man Based Upon Perjured Testimony

The prosecutor should have known that the eyewitness testimony was false; he negligently used that false testimony at trial. (Pet. Br. at 31 et seq.). Moreover, the State now knows that the eyewitness testimony was untrue (Pet. Br. at 18 et seq.), but continues to seek to carry out a death sentence resting on that testimony. The State argues that a rule against executing a man based upon perjured testimony is a "new" rule and under Teague cannot be announced on

habeas.[2/]

There is nothing "new" about the concept that the execution of a man based upon perjured testimony offends due process. As early as Mooney v. Holohan, 294 U.S. 103 (1935), this Court condemned the use of perjured testimony. There is nothing in Mooney that limits itself to knowing as opposed to negligent use of perjured testimony.

Nor is there anything "new" about a rule that negligent conduct by the prosecutor which leads to the corruption of the trial process, requires that a

---

2/ Respondents do not argue that Sanders v. Sullivan is incorrectly decided or that the perjury in the present case was not material: they only say that Sanders should not be applied to this case because of Teague. However, Petitioner did not obtain clear evidence that perjury had been committed until 1984, long after his conviction and sentence became final on direct appeal. It would have been impossible for Petitioner to raise any perjury-related issues at trial or on direct appeal -- the now compelling evidence of perjury was unavailable to Petitioner until much later.

verdict be set aside. Beginning with Brady and ending in United States v. Agurs, 427 U.S. 97 (1976), this Court established basic procedural safeguards to protect the fairness of trials. Under those cases, negligent conduct that leads to the mere withholding of material evidence can lead to setting aside a verdict.

It thus cannot be a "new" holding that negligent conduct in offering perjured testimony which affirmatively corrupts the judicial process is reason to set aside a verdict. Indeed, Agurs explicitly states that the Brady/Agurs doctrine encompasses, inter alia, perjury. 427 U.S. at 103-04.

B. Petitioner's Claim Implicates Bedrock Procedural Elements Which Make Teague Inapplicable

But even if this concept was "new", this Court must have the ability under Teague to correct the error, to hold that

the State may not negligently offer perjured testimony and then -- after discovering that perjury -- proceed to carry out the death sentence. As this Court held in Teague: a new rule should be applied retroactively if it "will properly alter our understanding of the *bedrock procedural elements* that must be found to vitiate the fairness of a particular conviction." 489 U.S. at 311 (quoting Mackey v. United States, 401 U.S. 667 (1971)) (emphasis in original).

Indeed, Teague cited perjured testimony as the type of wrong that justifies the application of a new rule:

> Finally, we believe that Justice Harlan's concerns about the difficulty in identifying both the existence and the value of accuracy-enhancing procedural rules can be addressed by limiting the scope of the second exception to those new procedures without which the likelihood of an accurate conviction is seriously diminished.
>
> * * *

> Because we operate from the premise that such procedures would be so central to an accurate determination of innocence or guilt, we believe it unlikely that many such components of basic due process have yet to emerge. We are also of the view that such rules are "best illustrated by recalling the classic grounds for the issuance of a writ of habeas corpus. . . . that the prosecutor knowingly made use of perjured testimony . . ."

489 U.S. at 313-14 (citation omitted) (emphasis added).

There can be few, if any, more fundamental elements to a trial under the rule of law than the proscription against perjured testimony. And cases as far back as Mooney and continuing through Brady hold that the procedural integrity of trials is basic to our concept of fundamental fairness.[3/]

[3/] As the Teague Court noted, a jury verdict in violation of the Batson rule "does not undermine the fundamental fairness that must underlie a conviction or seriously diminish the likelihood of obtaining an accurate conviction." 489 U.S. at 315. This may not be said of a jury which returns a verdict based on materially false testimony.

In Mesarosh v. United States, 352 U.S. 1 (1956), a federal case on direct appeal, this Court clearly expressed its position regarding the use of perjured testimony in its own courts:

> The dignity of the United States Government will not permit the conviction of any person on tainted testimony. This conviction is tainted, and there can be no other just result than to accord petitioners a new trial. . . . The government of a strong and free nation does not need convictions based upon such testimony. It cannot afford to abide with them.

Id. at 9, 15.

Habeas proceedings are the classic arena for assessing whether a defendant's rights have been violated through the unconstitutional use of perjured testimony.[4/] Teague should not deprive this Court of the ability to announce a rule that most Americans undoubtedly

---

[4/] Mooney, Sanders, and all the cases cited in the Respondents' Brief at 15-16 were decided on habeas review.

already believe is basic to due process of law: a man may not be put to death based on perjured eyewitness testimony.

C. The Mississippi Supreme Court's Ruling That The Eyewitness Testimony Was False Is Fully Supported By The Record; Counsel For Respondents May Not Ask This Court To Find That The Mississippi Supreme Court's Unanimous Finding Of Fact Was Unfounded

Counsel for Mississippi makes an additional and surprising argument, attacking as unfounded a unanimous finding of fact by the Mississippi Supreme Court. Counsel for Respondents argues to this Court that there was no perjury, and "no credible recantations" by the two supposed eyewitnesses who testified at trial. Resp. Br. at 18. This argument flies in the face of the Mississippi Supreme Court's unanimous holding that both eyewitnesses had perjured themselves at Petitioner's trial:

> [I]t has been clearly established that two of the state's witnesses committed perjury at this trial.

Smith, 492 So. 2d at 261.

The Mississippi Supreme Court's ruling on the "question of perjury" -- a pure issue of fact -- is entitled to the utmost deference. Sumner v. Mata, 449 U.S. 539, 546-547 (1981). See also Burden v. Zant, ___ U.S. ___, 111 S. Ct. 862, 864 (1991) (a determination of fact by a state court shall be presumed correct for purposes of a federal habeas corpus proceeding).

Mississippi's highest court made its factual finding after review of a record that included a full day of hearings at which thirteen witnesses testified at length. That record included a number of material documents -- produced for the first time at the hearing -- that the State had previously withheld from

Petitioner and his counsel.[5/] The

[5/] Counsel suggests that the Mississippi Supreme Court's finding of perjury is unfounded because it was based on the eyewitnesses' "failure to recant their recantations." (Resp. Br. at 22). That is not true. First, it was based on far more, as shown above. Second, the record of the hearing reflects that Messrs. Thomas and Wells, the two eyewitnesses, stood their ground despite extreme efforts by Special Assistant Attorney General Boyd to convince Mr. Thomas to "recant his recantation" (Record on Appeal of Petition for Writ of Error Coram Nobis ("CN") at 335), and to "advise" of the "problems that could result . . . [from] giving any type of false or perjurious affidavits or statements in the matter." (CN at 339, 357). Wells, for example, insisted that the statement given to the police and in court was "made up." (CN at 339).

At the hearing before the Circuit Court, the State supplied the ultimate pressure, threatening to prosecute the two eyewitnesses for perjury if they recanted their trial testimony. (CN at 9). In light of these threats, and upon advice of court-appointed counsel, both witnesses claimed their Fifth Amendment right against self-incrimination and declined to testify at the hearing. (CN at 76-84). However, as Mr. Boyd testified at length on cross-examination at the hearing, neither witness "recanted his recantation." (CN at 344, 357). The evidence of trial perjury admitted at the hearing included not only the affidavits of Thomas and Wells, but also lengthy sworn statements on tape recordings. (CN at 120, 124-143, 159-187, 189).

Mississippi Supreme Court's unanimous finding, based on a full record, cannot be questioned; and certainly not by the State's own lawyers.

II. THE "ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL" ISSUE IS NOT PROCEDURALLY BARRED AND REQUIRES THAT CERTIORARI BE GRANTED

The Mississippi Supreme Court, performing its statutory duty on direct appeal to review the aggravating circumstances, affirmed an invalid "especially heinous, atrocious or cruel" aggravating factor. It affirmed Petitioner's conviction and sentence without either re-weighing the aggravating and mitigating evidence or conducting a harmless error review. See Smith v. State, 419 So. 2d 563, 574 (Miss. 1982), cert. denied, 460 U.S. 1047 (1983).

Petitioner argued to the Fifth Circuit that Clemons v. Mississippi, ___ U.S. ___, 110 S. Ct. 1441 (1990),

required that this case be remanded to the Mississippi Supreme Court for re-weighing, harmless error analysis or further remand to the trial court for a new sentencing hearing. See Pet. Br. at 39 et seq. The Fifth Circuit held that such relief would require application of a recent opinion of this Court (Clemons) and was therefore barred by Teague. See Smith v. Black, 904 F.2d 950, 980-87 (5th Cir. 1990). (A128-59).

On January 22, 1991, the very day Petitioner filed his Petition, this Court decided Parker v. Dugger, ___ U.S. ___, 111 S. Ct. 731 (1991).[6/] Parker applied Clemons v. Mississippi to a case similar in its facts to the present case and remanded to the Florida Court for further

---

[6/] Parker v. Dugger was therefore not discussed in Petitioner's brief. Parker was decided six months after the Fifth Circuit's opinion in this case.

proceedings. Parker shows that this case should be remanded to the Mississippi Supreme Court.

A. Parker v. Dugger Establishes Petitioner's Right To Review

In Parker v. Dugger, this Court applied Clemons *retroactively* to a very similar case:

> After striking two aggravating circumstances, the Florida Supreme Court affirmed Parker's death sentence without considering the mitigating circumstances. This affirmance was invalid because it deprived Parker of the individualized treatment to which he is entitled under the Constitution. See Clemons, supra, 494 U.S., at __.

Parker, ___ U.S. at ___, 111 S. Ct. at 740 (emphasis added).

The pertinent citation from Clemons reads as follows:

> An automatic rule of affirmance in a weighing state would be invalid under Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982), for it would not give defendants the individualized treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances.

Clemons, ___ U.S. at ___, 110 S. Ct. at 1450 (emphasis added).

Parker and Smith cannot meaningfully be distinguished. Both were final on direct appeal prior to this Court's decision in Clemons, but after Lockett v. Ohio, 438 U.S. 586 (1978), and Eddings v. Oklahoma, 455 U.S. 104 (1982). In both Parker and Smith, the jury found an invalid aggravating circumstance and, although each case involved a "weighing" state, in each case the state's highest court failed to either re-weigh the evidence or conduct a harmless error analysis. In each case, the petitioner was deprived of the right to the individualized treatment that would result from a full consideration of the mitigating factors present in his case, after aggra-

vating factors had been held invalid.[7/]

Petitioner is entitled to the same relief this Court granted to Robert Parker. See Teague, 489 U.S. at 349, 351 ("Retroactivity is properly treated as a threshold question, for, once a new rule is applied to the defendant in the case announcing the rule, even-handed justice requires that it be applied retroactively to all who are similarly situated. . . . [S]elective application of new rules violates the principle of treating similarly situated defendants the same").

Respondent concedes that Parker applies. See Resp. Br. at 48. But, in an effort to avoid Parker, Respondent notes what is clear from the opinion itself:

[7/] In Petitioner's case, there has not yet been a finding that the use of the "especially heinous, atrocious or cruel" jury charge was invalid. However, there is also no longer any serious dispute about this issue. See Maynard v. Cartwright, 486 U.S. 356 (1988).

Parker did not explicitly discuss Teague.

Finally, whether Parker explicitly discusses Teague is of no moment: even-handed justice requires that all who are similarly situated be treated the same. Mr. Smith, just as much as Mr. Parker, is entitled to individualized consideration before he can be sentenced to death.

B. Petitioner Is Not Procedurally Barred

Finally, the State incorrectly argues that the Mississippi Supreme Court has already found Petitioner's claim to be procedurally barred, citing Smith v. State, 434 So. 2d 212, 218 (Miss. 1983). Resp. Br. at 28. When Petitioner's appeal became final in 1983, Mississippi did not strictly or regularly follow a procedural bar rule.[8/] Wheat v. Thigpen, 793 F.2d

---

[8/] This argument and others were presented to the Fifth Circuit, which did not reach the issue. Smith, 904 F.2d at 987 n.18. (A163).

621, 625-27 (5th Cir. 1986) (citing the very same Smith opinion on which the State relies); see Reddix v. Thigpen, 805 F.2d 506, 512 (5th Cir. 1986) (applying Wheat). The procedural bar rule later followed by the Mississippi Supreme Court thus does not apply here.

CONCLUSION

For all the additional reasons set forth above, the petition for certiorari should be granted.

Respectfully submitted,

Bruce D. Angiolillo
Counsel of Record

John J. Kenney
David E. Massengill
SIMPSON THACHER & BARTLETT
(a partnership which includes professional corporations)
425 Lexington Avenue
New York, New York 10017-3909
(212) 455-2000

Counsel for Petitioner
Willie Albert Smith

April 16, 1991

No. 90-1164

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

WILLIE ALBERT SMITH,

Petitioner,

v.

LEE ROY BLACK, Commissioner, Mississippi Dept. of Corrections, et al.,

Respondents.

AFFIDAVIT OF SERVICE

The undersigned, being duly sworn, on oath deposes and says:

That affiant is a citizen of the United States; that affiant is now and at times mentioned was of legal age, not a party to the above-entitled action and competent to be a witness herein.

That on the 16th day of April, 1991, this affiant duly served by first class mail, postage prepaid, three true and correct copies of Willie Albert Smith's Reply to Brief in Opposition to Petition for Writ of Certiorari to the United States

Court of Appeals for the Fifth Circuit,

addressed to:

Marvin L. White, Jr.
Assistant Attorney General
Post Office Box 220
Jackson, Mississippi 39205
(601) 359-3680
Counsel For All Respondents

John C. Gustafsson, Esq.
SIMPSON THACHER & BARTLETT
425 Lexington Avenue
New York, New York 10017-3909
(212) 455-2955

Sworn to before me this
16th day of April, 1991

Notary Public

MARK T. MILLKEY
NOTARY PUBLIC, State of New York
No. 31-4970839
Qualified in New York County
Certificate filed in New York County
Commission Expires : August 20, 1992